TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1941~~ 1942

No. ~~1169~~ 79

WILLIAM A. ADAMS, WARDEN OF THE CITY PRISON OF MANHATTAN, AND JAMES E. MULCAHY, UNITED STATES MARSHAL, PETITIONERS

vs.

THE UNITED STATES OF AMERICA, EX REL. GENE McCANN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 23, 1942
CERTIORARI GRANTED APRIL 27, 1942

SUPREME COURT OF THE UNITED STATES

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In United States Circuit Court of Appeals
Second Circuit

UNITED STATES OF AMERICA, EX REL. GENE MCCANN, PETITIONER

For a Writ of Habeas Corpus

vs.

WILLIAM A. ADAMS, WARDEN OF CITY PRISON OF MANHATTAN, 125 WHITE STREET, NEW YORK CITY AND/OR THE UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, RESPONDENTS

Writ of habeas corpus

March 12, 1942

The PRESIDENT OF THE UNITED STATES OF AMERICA.

To: William A. Adams, Warden of City Prison of Manhattan, 125 White Street, New York City and/or the United States Marshal for the Southern District of New York or any other person having custody of one Gene McCann.

Greetings:

You are hereby commanded that you have the body of Gene McCann now detained in the City Prison of Manhattan, 125 White Street, New York City, by you imprisoned and detained, as it is said, with the time and cause of the said imprisonment and detention, by whatsoever name the said Gene McCann is called or charged, before the Judges of the United States Circuit Court of Appeals, Second Circuit, then presiding at the United States Courthouse, Foley Square, New York City, Room 1705, at 10:30 o'clock in the forenoon of March 16th, 1942, to do and receive what shall then and there be considered concerning the said
2 Gent McCann, and have you then and there this Writ, and,

The United States Marshal for the Southern District of New York and/or one of his Deputies, be and he hereby is directed to serve a copy of this Writ on the said Warden or upon such person acting in his stead, before the return date of this Writ before this Court, pursuant to the existent order entered in the Court below (Section 656, Title 28, U. S. Code) directing such service without cost to the petitioner Gene McCann.

Witness the Honorable LEARNED HAND, Senior Judge and/or one of his Associate Judges of the United States Circuit Court of Appeals for the Second Circuit, at the United States Courthouse, Foley Square, New York City, on the 12 day of March 1942.

AUGUSTUS N. HAND,
United States Circuit Court Judge.

3 In United States Circuit Court of Appeals, Second Circuit

[Title omitted.]

Petition for writ of habeas corpus

Filed March 20, 1942

To the honorable judges of the United States Circuit Court of Appeals for the Second Circuit; Greetings:

The Petitioner, Gene McCann, respectfully shows to this Court and alleges:

First. That your petitioner was indicted on or about February 18th, 1941, by the Gread Jury in the District Court of the United States in and for the Southern District of New York, charging six distinct violations of Title 18, Section 338 of the United States Code, to wit, using the mails to defraud. The matter came on for trial on July 7th, 1941, before the Honorable Merrill E. Otis, District Court Judge from Missouri, presiding as a visiting judge in the Southern District of New York. On Judw 22nd, 1941, your petitioner was found guilty by the aforesaid Judge without a jury on all counts and was sentenced to a term of three years on each of the first three counts to run concurrently and three years

4 on each of the last three counts to run concurrently with each other but not concurrently with the sentence on the first three counts. In effect, the total sentence amounts to six years and a fine of $600.00.

Second. From the date of the indictment and at all times during all of the proceedings in connection with the said indictment in the aforesaid District Court, your petitioner was not represented by counsel nor did your petitioner have the aid, benefit or protection of any counsel; your petitioner is and at all times has been a layman and not an attorney and as a layman sought to establish his innocence to the best of his ability.

Third. That at the outset of the trial as aforementioned upon the indictment charging the six felonies as aforesaid, your petitioner proceeded to waive a jury trial in the following fashion as is revealed by the following extract from the Court Clerk's Minutes:

"July 7th, 1941: Room 318:
Mathias F. Correa, U. S. Attorney by Richard J. Burke.
Gene McCann, Pro se.
Honorable Merrill E. Otis, District Court Judge, Presiding.
Defendant moves to waive trial by jury and the Court to decide issues of fact. Motion granted on consent of U. S. Attorney."

Thereafter upon information and belief, your petitioner and the Assistant United States Attorney in charge signed a stipulation prepared by the Assistant United States Attorney waving a jury trial which said stipulation, upon information and belief contained the signature of Honorable Merrill E. Otis below the words "So Ordered."

Fourth. Your petitioner submits that the proceedings below were a nullity in view of the fact that your petitioner was not represented by counsel and in view of the fact that your petitioner did not have the benefit of a jury to pass upon the issues of fact.

5 Fifth. That the cause or pretense of such imprisonment of petitioner is the aforesaid judgment of conviction and sentence thereon; that the said confinement, imprisonment, and restraint are illegal and that the same deprive the petitioner of his liberty without due process of law and the detention is violative of petitioner's rights to his liberty pursuant to the Constitution of the United States and the State of New York wherein he is now detained; that the order of commitment and the confinement and detention are illegal and void and violate the provisions of the Federal and State Constitutions.

Sixth. That no previous application for a Writ of Habeas Corpus has been made on the specific grounds stated herein.

Wherefore your petitioner prays that a Writ of Habeas Corpus issue herein directed to the persons mentioned above, and that upon the return thereof an order be made herein directing that the petitioner be released from his imprisonment and custody of the United States officers now detaining him.

Dated March 20, 1942.

GENE McCANN,
Petitioner.

6 STATE OF NEW YORK,
County of New York, ss:

Gene McCann being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated upon information and that as to those matters he believes it to be true.

GENE McCANN.

Sworn to before me this 20th day of March 1942.

[SEAL.] THOS. D. ROMANELLA,
Notary Public.

7 In United States Circuit Court of Appeals for the Circuit

[Title omitted.]

Return to writ of habeas corpus

James Mulcahy, United States Marshal for the Southern District of New York and one of the alternate respondents herein, by Leo Lowenthal, Chief Deputy United States Marshal, for his return to the writ of habeas corpus herein and his answer to the petition:

1. Denies upon information and belief each and every allegation contained in paragraphs numbered 4th and 5th.

The respondent, further answering the said petition, alleges:

2. As United States Marshal for the Southern District of New York, respondent received a regular commitment under the seal of the United States District Court for the Southern District of New York and has at all times been ready to deliver the body of Gene McCann, the prisoner mentioned therein, to a United States penitentiary to serve the sentence imposed upon him, but has been stayed from so doing by the filing of a notice of appeal.

8 3. Upon information and belief, the petitioner did knowingly waive his right to the advice and assistance of counsel with full knowledge of the significance of such act.

4. Upon information and belief, petitioner was indicted on or about February 18, 1941, and upon arraignment on said indictment, requested an adjournment thereof, pending the making by him of a motion to quash the indictment for various reasons.

5. Upon information and belief, the aforesaid motion having been made upon voluminous papers and decided adversely to the petitioner herein, petitioner applied to this Court for a writ of mandamus to compel the District Court to grant his motion, which application was denied.

6. Upon information and belief, upon petitioner's refusing to enter a plea of either guilty or not guilty to the indictment, the District Court ordered that a plea of not guilty be entered, and advised the petitioner to retain counsel to defend him, which petitioner refused to do, stating in substance that he desired to represent himself; that the case was very complicated, and that he was so familiar with its details that no attorney would be able to give him as competent representation as he would be able to give himself.

7. Upon information and belief, thereafter petitioner brought three more motions in succession, seeking various forms of relief, all of which were prepared and argued by himself.

8. Upon information and belief, the trial commenced on July 7, 1941. When the case was called for trial in the Calendar Part of the District Court, the Court, Hon. Merrill E. Otis presiding (who subsequently tried the case), inquired of the petitioner whether he had counsel; petitioner replied he desired to represent himself; the Court inquired whether he was admitted to the Bar; petitioner replied that he was not, but that he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be.

9. Upon information and belief, petitioner then moved to have the case tried without a jury by the judge alone. There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney, at which it was determined that a form of waiver of petitioner's constitutional right to a jury trial should be prepared by the Assistant United States Attorney. Such a waiver was prepared and a copy thereof is hereto annexed and marked "Exhibit A." It was executed in writing by the petitioner and approved by the Assistant United States Attorney and by the Court.

10. Upon information and belief, the trial which ensued took two and a half weeks, during which the defendant represented himself without counsel.

11. Upon information and belief, he was convicted and sentenced, and filed an appeal and has up to this time and is at this very moment conducting his appeal in person although this Court, as did the Court below, has at least once suggested to him the advisability of his retaining counsel.

12. Upon information and belief, at petitioner's trial in the Court below, testimony disclosed that petitioner in person had in 1933 brought suit in the United States District Court against over six hundred individual defendants, demanding thirty million dollars damages for conspiracy in restraint of his trade, and had represented himself therein in person although he had been assisted at the trial thereof in 1936 by an attorney who appeared only, however, as "of counsel" to the petitioner. Testimony also disclosed that the petitioner conducted his own appeal in that matter without the aid of counsel to this Court and to the Supreme Court of the United States. The testimony also disclosed that the petitioner had brought suit, prior to

his indictment, in the Supreme Court of the State of New York against Joseph Brieloff and others who were subsequently named in the indictment as "victims," had conducted the case in person without counsel and had tried it in person in the said Supreme Court. Respondent refers to this testimony to show petitioner's intelligence, experience, and familiarity with courts and legal proceedings, as bearing upon the legality of his waiver of the rights to representation by counsel and a trial by jury.

Wherefore, respondent prays that the writ of habeas corpus be dismissed and the relator be remanded to the custody of the United States Marshal for the Southern District of New York to be dealt with in accordance with law.

JAMES E. MULCAHY,
James Mulcahy, *Respondent.*
By LEO LOWENTHAL,
Chief Deputy, United States Marshal.

11 STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Leo Lowenthal, Chief Deputy United States Marshal for the Southern District of New York, being duly sworn, deposes and says that he is acting for James Mulcahy, United States Marshal; that he has read the foregoing return and knows the contents thereof; that the same is true to his own knowledge except such matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sources of deponent's knowledge and grounds of his belief as to all matters herein alleged upon information and belief consist of the files of the United States District Court for the Southern District of New York, and the annexed affidavit of Richard J. Burke, Assistant United States Attorney for the Southern District of New York.

LEO LOWENTHAL.
Leo Lowenthal.

Sworn to before me this 20th day of March 1942.

[SEAL] THOS. D. ROMANELLA,
Thos. D. Romanella,
Notary Public.

12 *Exhibit A to return*

United States District Court, Southern District of New York

UNITED STATES OF AMERICA

v.

GENE McCANN, DEFENDANT

I, Gene McCann, the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the Court of my constitutional rights.

Dated: New York, N. Y., July 7, 1941.

(signed) GENE McCANN,
Defendant, appearing personally.

Consented to:

(Signed) RICHARD J. BURKE,
Assistant United States Attorney.

So ordered:

MERRILL E. OTIS,
U. S. District Judge.

13 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Affidavit of Richard J. Burke

Richard J. Burke, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York and is in charge of the prosecution of the above matter on behalf of the United States Marshal for the Southern District of New York.

That he has read the foregoing return to the writ of habeas corpus and knows the contents thereof, and the same is true to his own knowledge, including all matters therein stated to be alleged on information and belief.

RICHARD J. BURKE.
Richard J. Burke,

Sworn to before me this 20th day of March 1942.

[SEAL].

THOS. D. ROMANELLA,
Thos. D. Romanella,
Notary Public.

14 In United States Circuit Court of Appeals for the Second Circuit

No.—. October Term, 1941

(Motion argued March 20, 1942—Decided March 27, 1942)

UNITED STATES EX REL. GENE MCCANN, RELATOR

v.

WILLIAM A. ADAMS, WARDEN OF THE CITY PRISON OF MANHATTAN, AND JAMES E. MULCAHY, UNITED STATES MARSHAL, RESPONDENTS

On return to the circuit court of appeals upon a writ of habeas corpus, issued out of that court pending an appeal from a criminal conviction.

Before L. HAND, SWAN, and CHASE, Circuit Judges.

Frank J. Walsh for the relator.

Richard J. Burke opposed.

Opinion

15 L. HAND, Circuit Judge:

This case comes before us upon the return to a writ of habeas corpus, issued by a judge of this court. The relator was convicted on July 22, 1941, after a trial to a judge without a jury upon an indictment in six counts for using the mails to defraud. (§ 338, Title 18, U. S. Code.) He took an appeal and the trial judge fixed his bail at $10,000; being unable to procure this, he has been in custody since sentence. As the minutes have never been typed and until very recently he has had no lawyer to represent him and has no money, he has hitherto been unable to prepare any bill of exceptions, and it is at least doubtful whether any can ever be made up on which the appeal can be heard. Although his time has been extended again and again, so far little progress has been made. Moreover if any bill is ever settled, it is certain to be an unsatisfactory record of what took place at the trial. He has now, however, secured the assistance of an attorney, who first applied to us for his release on bail—more accurately for a reduction of the bail. We did reduce the amount to $1,000; but at the same time we suggested that he take out a writ of habeas corpus returnable before us, to raise the question of the jurisdiction of the district court for reasons that will appear. It is upon a return to that writ before this court in banc that the case now comes up.

The first question is of our own jurisdiction to entertain the writ and consider the point. Whitney v. Dick, 202 U. S. 132, decided that a circuit court of appeals might not issue a writ of habeas

corpus to review a judgment of conviction of the district court when the case was not already before it on writ of error; but the opinion declared that "cases may arise in which the writ of habeas corpus is necessary to the complete exercise of the appellate jurisdiction" (p. 136). What those "cases" were the court did
16 not find it necessary to say; but it was assumed that when they did arise, jurisdiction to issue the writ could be found in that section of the Revised Statutes which is now § 377 of Title 28, U. S. Code. In the particular circumstances of the case at bar, it seems to us that the writ it "necessary to the complete exercise" of our appellate jurisdiction because for the reasons we have given there is a danger that it cannot be otherwise exercised at all and a certainty that it must in any event be a good deal hampered. Moreover, we think that the writ is good on another ground. Rule VI of the rules governing criminal appeals confers upon us jurisdiction over bail once an appeal has been taken; and obviously it cannot be an objection that in deciding that an appellant should be released without bail, we incidentally decide that the appeal will succeed. If, however, we did so decide, our order would not dispose of the appeal, because we have no such power under Rule VI; and the appellant would be compelled to go on with the preparation of his bill of exceptions. It is true that a bill of exceptions might here be prepared which would be confined to the single point raised by this writ, but that would make the relator stake his whole case on that point, which is not fair. Therefore, it seems to us that the situation falls within the dictum of Whitney v. Dick, supra (202 U. S. 132) and that § 377 of Title 28, U. S. Code, gives us power to entertain the writ.

The fact are as follows. From the time of his arraignment on February 18, 1941, the relator conducted his case without the assistance of an attorney. After several interlocutory matters had been disposed of and he was called upon to plead, he refused to do so and a plea of not guilty was entered for him. He was then advised to retain an attorney but refused, saying that he wished to represent himself which he could do better than any
17 attorney could do for him. More interlocutory proceedings were had, in which again he represented himself; and finally the case came on for trial on July 7, 1941, when, in answer to an inquiry of the judge, he repeated that he wished to act without any attorney because, though not admitted to any bar, he had studied law and was able to defend himself, being more familiar with the facts than any attorney could ever be. He then moved to have the case tried by the judge without a jury and signed a consent in the following words: I "do hereby waive a

trial by jury in the above entitled case, having been advised by the Court of my constitutional rights." The judge entered an order approving this "waiver" and the trial began: it lasted for two weeks and a half and throughout it the relator acted for himself. At no time did he indicate that he wished a jury or that he repented of his consent—either while the cause was in the district court or in this court—until the attorney, who now represents him, in March, 1942, raised the point in the way we have mentioned. The question is whether under these circumstances the judge had jurisdiction to try him.

It will have been at once observed that if the right of trial by jury is one which the accused may surrender as he may surrender any other privilege or right, the relator unconditionally surrendered it. Not only did he do this expressly after his rights had been explained to him, and never afterwards recant; but he was actually the moving party, for it was he who asked the judge to try him. Furthermore, there is reason to suppose that in fact he did not suffer by submitting his guilt to a judge rather than a jury: for already in a civil action involving the same or similar transaction a jury of the Southern District of New York had decided against him. McCann v. New York Stock Exchange, 107 Fed. (2d) 908 (C. C. A. 2). This point is therefore presented to us in the barest possible form: Has an accused, who is without counsel, the power at his own instance to surrender his right of trial by jury when indicted for felony? Since the case of Patton v. United States, 281 U. S. 276, the surrender of that right has not been before the Supreme Court, but we are to assume that that decision is still law, at least as to the point actually decided, which was that the accused might lawfully consent to a jury of less than twelve—eleven as it chanced. It is quite true that the opinion proceeded upon broader grounds. "An affirmative answer to the question certified, logically requires the conclusion that a person charged * * * may * * * waive trial by a jury of twelve and consent to a trial by any lesser number, or by the court without a jury" (p. 290). Hughes C. J., took no part in the decision, and Holmes, Brandeis and Stone, JJ., concurred only in the result; perhaps because they did not think that consenting to go on before a jury of eleven, after one had fallen ill, involved the same constitutional question as consenting to a trial "by a court without a jury." Whether or not it does, practically there is much difference between being tried by a jury of eleven, or six, or for that matter even of three, and being tried by a judge. The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can for-

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feit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly, or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury, however small, preserves both these fundamental elements and a trial by a judge preserves neither, at least to anything like the same degree.

19 Be that as it may, in any event the court in Patton v. United States, supra (281 U. S. 276), was plainly concerned to protect even that measure of surrender which had been made in the case before it, as appears from the language (p. 312) with which it hedged the accused's power. They meant his consent, to be jealously scrutinized; they did not mean to impose upon him the same responsibility for his choice as rests upon him in ordinary affairs. It appears to us that we should treat it as a critical circumstance—at least, when the accused surrenders his right to any jury whatever—that he shall have the advice and protection of counsel in making that choice. We are by no means sure that we should have thought so, had it not been for the recent decisions of the Supreme Court in Johnson v. Zerbst, 304 U. S. 458, and especially in Glasser v. United States, 314 U. S.—. Neither is indeed on all fours with the case at bar; and each presupposes that, if fully advised, the accused may be tried without counsel and may conduct his own case. The relator at bar, having been so advised and insisting upon defending himself, took his chances therefore as to the general conduct of the trial; if he suffered, his misfortune was on his own head. But as to the point here two scruples coalesce, and as to each the Supreme Court has shown itself especially sensative. There are indeed laymen who are quite capable of appraising their chances as between judge and jury—the relator is probably one of these—but a right so fundamental should not depend upon the outcome of a preliminary inquiry as to the competency of the particular accused; and certainly there can be no doubt that the ordinary layman does not have the necessary experience. Limiting ourselves therefore to the exact situation before us, we hold that when on trial for a felony, the accused—at least when not himself a lawyer—may not consent to be tried by a judge except upon the advice of an

20 attorney, retained by him or assigned to him, even though that advice extends to no more than that particular choice.

For the foregoing reasons the relator will be discharged.

Relator discharged.

Dissenting opinion

CHASE, Circuit Judge (dissenting):

The discharge of the relator seems to have been put upon the ground that even though he may have had a thorough understanding of his constitutional and other rights he could not lawfully waive his right to a trial by jury because he acted without the assistance of an attorney. If my understanding is correct, a limitation has been placed upon an accused's right to act without counsel and conduct his own trial to the extent that he cannot agree to be tried without a jury, though the court may have advised him as to his rights and then have approved his choice, unless an attorney advises him also.

It is clear that we, bound to give effect to Patton v. United States, 281 U. S. 276, must take it for granted that the relator could waive a trial by jury. It seems to be equally clear that he could waive his right to have the assistance of counsel in so doing. Johnson v. Zerbst, 304 U. S. 458; Glasser v. United States, 314 U. S. ——.

He certainly made it abundantly clear that he did not want the assistance of counsel and that he did not want to be tried by a jury. If he was competent to reach such decisions in the sense that he had knowledge and intelligence enough to make them with understanding of the possible consequences, it is of no moment that he was, or became, competent without the assistance of counsel. Whether or not he was in fact competent was a matter for the court to determine and the order made on the waiver of a jury trial was, in the absence of any showing whatever
21 to the contrary, sufficient evidence of such a determination though an express finding would, perhaps, have been in order. However that may be, it is enough for present purposes that the relator has the burden, which he has not carried, "to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel" (Johnson v. Zerbst, supra) before the lack of such assistance is held to invalidate his waiver of a jury trial and is made the basis of his discharge on this writ.

I would dismiss the writ.

22 In United States Circuit Court of Appeals, Second Circuit

Present: Honorable LEARNED HAND, Honorable THOMAS W. SWAN.

UNITED STATES OF AMERICA, EX REL GENE MCCANN

vs.

WILLIAM A. ADAMS, WARDEN OF CITY PRISON OF MANHATTAN, 125 WHITE STREET, NEW YORK CITY, AND/OR THE UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, RESPONDENTS

Order releasing relator

March 31, 1942

Upon reading and filing the writ of habeas corpus issued by the Honorable Augustus N. Hand, United States Circuit Court Judge, on the 12th day of March 1942, and the petition therefor of Gene McCann verified the 20th day of March 1942, and the return of the respondents James Mulcahy, United States Marshal for the Southern District of New York, by Leo Lowenthal, Chief Deputy United States Marshal, verified the 20th day of March 1942, with Exhibit "A" annexed thereto, and the affidavit of Richard J. Burke, Assistant United States Attorney for the Southern District of New York, verified the 20th day of March 1942, and after hearing Frank J. Walsh, Esquire, in support of the said petition, and Richard J. Burke in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the Circuit Court of Appeals herein, dated March 27, 1942, on motion of Frank J. Walsh, Esquire, attorney for the relator, it is hereby

23 Ordered, adjudged, and decreed that the relator Gene McCann be and hereby is ordered to be forthwith released from the custody in which he now is, and the United States Marshal, one of the respondents herein, is ordered to effect such release upon condition that the relator post bail with good and sufficient surety in the amount of $1,000 to secure his appearance to prosecute his appeal now pending in this Court from a judgment and conviction in the United States District Court for the Southern District of New York on indictment numbered C 109–231, and also to secure his appearance for his further trial and prosecution in the United States District Court upon said indictment.

LEARNED HAND,
THOMAS W. SWAN,
C. J. J.

24 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1942

Supreme Court of the United States

Order allowing certiorari

Filed April 27, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument on Tuesday, May 5th, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1942

No. ~~1169~~ 79

In the Supreme Court of the United States

OCTOBER TERM, 1941

WILLIAM A. ADAMS, WARDEN OF THE CITY PRISON OF MANHATTAN, AND JAMES E. MULCAHY, UNITED STATES MARSHAL, PETITIONERS

v.

THE UNITED STATES OF AMERICA, EX REL. GENE McCANN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1169

WILLIAM A. ADAMS, WARDEN OF THE CITY PRISON OF MANHATTAN, AND JAMES E. MULCAHY, UNITED STATES MARSHAL, PETITIONERS

v.

THE UNITED STATES OF AMERICA, EX REL. GENE McCANN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the above named petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on March 31, 1942, upon an original petition for a writ of habeas corpus filed in that court, directing that respondent be released from the custody of petitioner.

OPINION BELOW

The opinion of the court below (R. 8–12) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 31, 1942 (R. 13). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Respondent, who was indicted for commission of a felony, knowingly and voluntarily waived the assistance of counsel. Being fully cognizant of his constitutional right to trial by jury, he thereafter made a motion that he be tried by the court without a jury; the trial court granted that motion. May a judgment of conviction lawfully be entered after a trial so conducted?

2. After conviction, the respondent appealed to the court below. Did that court have jurisdiction, while the appeal was pending, to entertain a petition for a writ of habeas corpus and to order the respondent's discharge from custody?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution and pertinent statutes are set forth in the Appendix.

STATEMENT

Respondent was convicted on July 22, 1941, in the United States District Court for the Southern District of New York upon an indictment in six

counts for using the mails to defraud in violation of 18 U. S. C. § 338, and was sentenced to imprisonment for six years and to pay a fine of $600 (R. 2). He thereupon appealed to the court below and his appeal is still pending in that court, the time for filing a bill of exceptions having been extended from time to time (R. 8).

At the suggestion of the circuit court of appeals (R. 8), respondent filed a petition for a writ of habeas corpus in that court alleging that his trial and conviction "were a nullity" because he "was not represented by counsel" and "did not have the benefit of a jury to pass upon the issues of fact" (R. 2–3). The writ was issued (R. 1) and the United States Marshal made a return (R. 4–7). After argument on the petition and return, the court below ordered respondent's discharge from custody (R. 11).[1]

The pertinent facts, none of which are disputed, may be summarized as follows:

When respondent was called upon to enter his plea, the trial judge advised him to retain counsel but respondent refused, "stating in substance that

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[1] The final order (R. 13) directed that respondent "be forthwith released from the custody in which he now is" upon condition that he post bail of $1,000 "to secure his appearance to prosecute his appeal now pending in this court * * * and also to secure his appearance for his further trial and prosecution in the United States District Court upon said indictment." Respondent has remained in custody because of his inability to procure bail.

he desired to represent himself, that the case was very complicated, and that he was so familiar with its details that no attorney would be able to give him as competent representation as he would be able to give himself" (R. 4). Again, when the case was called for trial, respondent repeated that "he desired to represent himself" for, although he was not admitted to the bar, "he had studied law and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be" (R. 5). In addition to various preliminary proceedings initiated by respondent prior to his trial, the record also shows that he has represented himself in extensive civil litigation (R. 5–6, 9). The petition for habeas corpus does not suggest that he did not knowingly and voluntarily waive the assistance of counsel.

Upon the trial, respondent moved to have the case tried by the judge without a jury. "There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney" following which respondent's motion was "granted on consent of the United States Attorney" (R. 5). Thereafter respondent signed the following waiver which was consented to by the Assistant United States Attorney and approved by the district judge (R. 7):

> I, GENE MCCANN, the defendant herein, appearing personally, do hereby waive a

trial by jury in the above entitled case, having been advised by the Court of my constitutional rights.

Respondent represented himself throughout the ensuing trial which extended for two and a half weeks. Upon conviction, he filed an appeal which he has attempted to perfect in person, although the trial court and appellate court each suggested to him at least once the advisability of retaining counsel (R. 5).

Finally, respondent secured the assistance of counsel who, in applying to the court below for a reduction of the bail fixed by the trial court, raised the question of the jurisdiction of the district court to try respondent without a jury. The circuit court of appeals then "suggested that he take out a writ of habeas corpus returnable before us" (R. 8).

This suggestion was followed, the writ being issued on March 12, 1942,[2] by Circuit Judge A. N. Hand and made returnable "before the judges of the United States Circuit Court of Appeals, Second Circuit, then presiding" (R. 1). Argument was

[2] The writ was issued March 12, 1942, whereas the petition therefor is dated March 20, 1942. This is explained, we are advised by the United States Attorney, by reason of the fact that the circuit court of appeals at the time of argument requested respondent to withdraw his previous petition and file a substituted petition in order to eliminate certain issues of fact and reduce the matter to a pure question of law.

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heard before the court *en banc* with Judges L. Hand, Swan and Chase sitting. The court held (R. 8–9) that, pursuant to the dictum in *Whitney* v. *Dick*, 202 U. S. 132, 136, it had jurisdiction under 28 U. S. C. § 377 to entertain the writ in aid of its appellate jurisdiction. On the merits, the majority of the court held (R. 10–11) that, although respondent had unconditionally waived his right to the assistance of counsel and to trial by jury, he was nevertheless entitled to his discharge. In reaching this result, the court stated that "the Supreme Court has shown itself especially sensitive" concerning the right to trial by jury in *Patton* v. *United States*, 281 U. S. 276, and to the assistance of counsel in *Johnson* v. *Zerbst*, 304 U. S. 458 and "especially" in *Glasser et al.* v. *United States*, Nos. 30, 31, 32, October Term, 1941, decided January 19, 1942. The court therefore concluded (R. 11):

> Limiting ourselves therefore to the exact situation before us, we hold that when on trial for a felony, the accused—at least when not himself a lawyer—may not consent to be tried by a judge except upon the advice of an attorney, retained by him or assigned to him, even though that advice extends to no more than that particular choice.

Judge Chase, dissenting, expressed the view that the writ should be dismissed on the merits (R. 12).

REASONS FOR GRANTING THE WRIT

I

The far-reaching significance of the decision below in the administration of the federal criminal law needs little emphasis. If the accused may not waive a trial by jury except upon the advice of an attorney, as the court below held, it follows *a fortiori* that the advice of counsel is equally requisite to a valid plea of guilty where the accused by his own voluntary act effectively surrenders his liberty. During the fiscal year ending June 30, 1941, of the 40,100 defendants convicted in the United States District Courts, 3,349 were tried by the court and 4,977 had a jury trial. The other 31,774 apparently pleaded either guilty or *nolo contendere*. *Annual Report of the Director of the Administrative Office of the United States Court*, 1941, Table 11, p. 115; Table 13, p. 119. While the records available to us do not reveal precisely how many of those who waived jury trial or pleaded guilty did so without the advice of counsel, it is a matter of common knowledge, of which this Court may take judicial notice, that a large percentage of those who plead guilty do so after having waived assistance of counsel. Under the rationale of the decision below, all of those defendants who, without the advice of counsel, did plead guilty, or were tried by the court without a jury, would appear entitled to discharge upon habeas corpus.

Furthermore, although the court below professed to be deciding only the rights of the respondent upon the particular facts of this case (R. 11), it would seem logically to follow that if, as the court held, an accused, when defending himself *in propria persona*, may not waive the right to trial by jury, he also may not waive any of the other rights guaranteed to him under the Fifth and Sixth Amendments. For, contrary to the view expressed by the court below (R. 11), this Court has clearly indicated that the right to trial by jury is no more fundamental in the administration of the criminal law than the other rights guaranteed by the Constitution. See *Palko* v. *Connecticut*, 302 U. S. 319, 325; *Schick* v. *United States*, 195 U. S. 65, 71–72; cf. *Belt* v. *United States*, 4 App. D. C. 25, 35–36; *In re Belt*, 159 U. S. 95, 99.[3] Yet it has consistently been held that these other constitutional rights may be waived.[4]

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[3] In *Palko* v. *Connecticut*, *supra*, this Court stated that the right to trial by jury is not "'so rooted in the traditions and conscience of our people as to be ranked as fundamental' * * *. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without" it. The Court further observed that the right to a jury trial does not rise to the same "plane of social and moral values" as the right to the assistance of counsel which is "implicit in the concept of the ordered liberty" (pp. 325, 326).

[4] Thus, a defendant may waive his right to a "speedy trial," *Pietch* v. *United States*, 110 F. (2d) 817, 819 (C. C. A. 10), certiorari denied, 310 U. S. 648; *Daniels* v. *United States*, 17 F. (2d) 339, 344 (C. C. A. 9), certiorari denied,

Indeed, the effect of the decision below may well extend far beyond the waiver of express constitutional rights. For if, as the court stated, it is fundamentally unfair to permit an accused, who insists upon representing himself, to waive a trial by jury because "the ordinary layman does not have the necessary experience" to make an independent choice (R. 11), it would seem equally unfair to allow an accused, without the assistance of counsel, to waive, for example, seriously prejudicial errors concerning the admissibility of evidence or in the court's charge to the jury.[5]

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274 U. S. 744; *Worthington* v. *United States*, 1 F. (2d) 154 (C. C. A. 7), certiorari denied, 266 U. S. 626; *Phillips* v. *United States*, 201 Fed. 259, 262 (C. C. A. 8); his right to trial by an impartial jury "of the state [and district] where the said Crimes shall have been committed," *Hagner* v. *United States*, 54 F. (2d) 446, 447–449 (App. D. C.), affirmed, 285 U. S. 427; and his right "to be confronted with the witnesses against him," *Grove* v. *United States*, 3 F. (2d) 965 (C. C. A. 4), certiorari denied, 268 U. S. 691; *Fukunaga* v. *Territory of Hawaii*, 33 F. (2d) 396, 397 (C. C. A. 9), certiorari denied, 280 U. S. 593. Similarly, an accused may waive the privileges against being twice placed in jeopardy (*Trono* v. *United States*, 199 U. S. 521), and against self-incrimination (*Wilson* v. *United States*, 162 U. S. 613); *Powers* v. *United States*, 223 U. S. 303; *United States* v. *Block*, 88 F. (2d) 618 (C. C. A. 2)), both of which are guaranteed by the Fifth Amendment.

[5] Compare *Johnson* v. *Zerbst*, 304 U. S. 458, at pp. 462–463, where this Court pointed out: "* * * the average defendant does not have the professional legal skill to protect himself * * *. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious."

We believe that the rule enunciated below is neither required nor justified by the Constitution. Until the decision in this case, the right knowingly and voluntarily to waive the assistance of counsel has been in no way limited to any particular phase of a criminal proceeding,[6] and since *Patton* v. *United States*, 281 U. S. 276, 290, it has been settled in the federal courts that an accused may waive his right to trial by jury so long as there is compliance with the safeguards there prescribed by this Court.[7] In our view, there is nothing in the

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[6] *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463; *Williams* v. *Sanford*, 110 F. (2d) 526 (C. C. A. 5), certiorari denied, 310 U. S. 643; *Harpin* v. *Johnston*, 109 F. (2d) 434 (C. C. A. 9), certiorari denied, 310 U. S. 624; *Moore* v. *Hudspeth*, 110 F. (2d) 386, 388 (C. C. A. 10), certiorari denied, 310 U. S. 643; *Buckner* v. *Hudspeth*, 105 F. (2d) 396, 397 (C. C. A. 10), certiorari denied, 308 U. S. 553; *Zahn* v. *Hudspeth*, 102 F. (2d) 759, 761 (C. C. A. 10), certiorari denied, 307 U. S. 642; *Cundiff* v. *Nicholson*, 107 F. (2d) 162 (C. C. A. 4); *Franzeen* v. *Johnston*, 111 F. (2d) 817, 820 (C. C. A. 9); *McCoy* v. *Hudspeth*, 106 F. (2d) 810, 811 (C. C. A. 10); *Wilson* v. *Hudspeth*, 106 F. (2d) 812, 813 (C. C. A. 10); *Pers* v. *Hudspeth*, 110 F. (2d) 812, 813 (C. C. A. 10); *Blood* v. *Hudspeth*, 113 F. (2d) 470, 471 (C. C. A. 10); *Cooke* v. *Swope*, 28 F. Supp. 492 (W. D. Wash.), affirmed, 109 F. (2d) 955 (C. C. A. 9); *Ervin* v. *Sanford*, 27 F. Supp. 892 (N. D. Ga.).

[7] See *Ferracane* v. *United States*, 47 F. (2d) 677, 679, (C. C. A. 7); *Jabczynski* v. *United States*, 53 F. (2d) 1014, 1015 (C. C. A. 7); *United States* v. *Brunett*, 53 F. (2d) 219, 226 (W. D. Mo.); *Brouse* v. *United States*, 68 F. (2d) 294 (C. C. A. 1); *Irvin* v. *Zerbst*, 97 F. (2d) 257, 258 (C. C. A. 5); *United States* v. *Streul*, 99 F. (2d) 474, 478 (C. C. A. 2); *Hagner* v. *United States*, 54 F. (2d) 446, 448 (App.

Patton case, on the one hand, or in *Johnson* v. *Zerbst*, 304 U. S. 458 and *Glasser et al.* v. *United States, supra,* on the other—the decisions relied upon by the court below—which requires a contrary rule when the two rights chance to "coalesce" in the same case.

The circuit court of appeals recognized (R. 10) that, although the defendant in the *Patton* case was tried by a jury of eleven, "the opinion proceeded upon broader grounds" and held that an accused may consent to a trial "by the court without a jury". 281 U. S. at p. 290. The majority below, however, expressed the view that such a broad rule was unnecessary to the decision in the *Patton* case, because "trial by any jury, however small," unlike trial by a judge, preserves the "fundamental elements" of the right to jury trial (R. 10–11). But this Court in the *Patton* case expressly rejected "*in limine* the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve" 281 U. S. at p. 290. Similarly, contrary to the suggestion below that an accused has a right to a trial before jurymen who "unlike any official, are in no wise accountable" for what they do (R. 10–11), this Court said that "* * * since it

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D. C.); *Spann* v. *Zerbst*, 99 F. (2d) 336 (C. C. A. 5); *Brown* v. *Zerbst*, 99 F. (2d) 745, 746 (C. C. A. 5); cf. *Dillingham* v. *United States*, 76 F. (2d) 36 (C. C. A. 5); *Rees* v. *United States*, 95 F. (2d) 784 (C. C. A. 4).

was permissible for an accused to plead guilty and thus waive *any* trial, he must necessarily be able to waive a *jury* trial" (281 U. S. at p. 291) and, again, that it would be inconsistent "to permit the accused to dispense with *every* form of trial by a plea of guilty, and yet forbid him to dispense with a *particular* form of trial by consent" (*id.*, p. 306).

Johnson v. *Zerbst*, and *Glasser et al.* v. *United States*, *supra*, the other two cases relied upon by the court below, lend no support to its decision. In each case this Court recognized the right of an accused to waive the assistance of counsel. Consequently, the statement of the court below that those decisions compel the conclusion that the assistance of counsel is a jurisdictional requisite to a valid waiver of trial by jury is, we believe, entirely without foundation. Indeed, if the accused cannot legally be convicted except by the verdict of those who will "melt anonymously in the community" and who are subject to the "mollifying influence of current ethical conventions", as the court indicated (R. 10-11), it would seem immaterial whether the accused was represented by an attorney or not. Nor has it been suggested until now that the right to the assistance of counsel is required where the accused is charged with a felony but not when he stands trial for a misdemeanor.

Because the decision below may have such far-reaching effects upon other cases, because it is, we believe, contrary to the applicable decisions of

this Court, and because, in our view, it enunciates a clearly erroneous rule with respect to the constitutional requisites of a fair trial, we submit that review by this Court is plainly warranted.

II

In addition to the issue on the merits, the decision below presents an important and doubtful question concerning the jurisdiction of circuit courts of appeals to issue writs of habeas corpus under circumstances such as those here involved. The court below, accepting the fact that it has no authority to issue original and independent writs of habeas corpus,* nevertheless held that it had power to issue the writ here in question by virtue of the provisions of Section 262 of the Judicial Code, conferring upon the circuit courts of appeals "power to issue all writs not specifically provided for by statute, which may be necessary for the exercise" of their appellate jurisdiction. The court reasoned that issuance of the writ in this case was necessary to

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* *United States* v. *Mayer*, 235 U. S. 55, 65–66; *Whitney* v. *Dick*, 202 U. S. 132, 137; *Sweetney* v. *Johnston*, 121 F. (2d) 445 (C. C. A. 9), certiorari denied, October 13, 1941; *In re Anderson*, 117 F. (2d) 939, 940 (C. C. A. 9); *De Maurez* v. *Swope*, 110 F. (2d) 564, 565 (C. C. A. 9); *Ferguson* v. *Swope*, 109 F. (2d) 152 (C. C. A. 9); *Smith* v. *Johnston*, 109 F. (2d) 152, 156 (C. C. A. 9); *Hall* v. *United States*, 78 F. (2d) 168, 170 (C. C. A. 10); cf. 28 U. S. C. § 451; *United States* v. *Avis*, 108 F. (2d) 457 (C. C. A. 3).

the complete exercise of its appellate jurisdiction[9] for two reasons: (1) "it is at least doubtful" that respondent will be able to make up an adequate bill of exceptions to permit review of all of his assignments of error, and although he might prepare a bill which would be sufficient to raise "the single point raised by this writ * * * that would make the relator stake his whole case on that point, which is not fair"; and (2) the court has power, upon an application for release without bail pending appeal, "incidentally [to] decide that the appeal would succeed" but does not have the power "to dispose of the appeal" and excuse the appellant from going "on with the preparation of his bill of exceptions."

It is well settled, however, that the appellate jurisdiction of a circuit court of appeals is wholly statutory,[10] and in criminal cases its power to re-

[9] Although Judge A. N. Hand signed the writ issued for the purpose of inquiring into the causes of the respondent's detention (R. 1), this was not a habeas corpus proceeding before a judge of a circuit court of appeals, authorized by 28 U. S. C. §§ 452 and 463 (a), for the writ was made returnable before the court (R. 1), was considered by the court *en banc* (R. 8), and the order resulting therefrom was an order of the court (R. 13). Cf. *Carper* v. *Fitzgerald*, 121 U. S. 87.

[10] *Leimer* v. *State Mut. Life Assur. Co.*, 106 F. (2d) 793 (C. C. A. 8), appeal dismissed, 107 F. (2d) 1003); *In re Philadelphia & Reading Coal & Iron Co.*, 103 F. (2d) 901, 903 (C. C. A. 3); *United States* v. *Rayburn*, 91 F. (2d) 162, 164, C. C. A. 8); *Fidelity & Casualty Co. of New York* v. *Turby*, 81 F. (2d) 229 (C. C. A. 3); *Emlenton Refining Co.* v. *Chambers*, 14 F. (2d) 104, 105 (C. C. A. 3), certiorari denied, 273 U. S. 731; cf. *Sumi* v. *Young*, 300 U. S. 251, 252.

view a conviction is limited by Section 128 of the Judicial Code (28 U .S. C. § 225) to review by appeal. *United States* v. *Mayer,* 235 U. S. 55, 65–66; *Morgan* v. *Thompson,* 124 Fed. 203, 204 (C. C. A. 8); cf. *Sumi* v. *Young,* 83 F. (2d) 752, 753 (C. C. A. 9), affirmed, 300 U. S. 251. It would seem, therefore, that a writ of habeas corpus may be issued by that court in aid of its jurisdiction to review a conviction only as an auxiliary process to aid the appeal. *United States* v. *Mayer, supra,* pp. 65–66; *Whitney* v. *Dick, supra,* p. 136; *McClellan* v. *Carland,* 217 U. S. 268, 279, 280. This would include, for example, the power to issue writs of habeas corpus *ad testificandum* and *ad prosequendum* in appropriate cases. But where, as here, the writ is used as a substitute for, rather than as an aid to, the appeal, the power would seem to be lacking. For Congress has authorized only district courts and this Court, or judges of the circuit courts of appeals sitting as district judges,[11] to entertain an original habeas corpus proceeding to test the validity of a judgment and commitment. 28 U. S. C. §§451, 452, 463 (a); see cases cited n. 8, *supra.*

That the writ in this case was used as a substitute for, rather than as an aid to, the appeal seems plain. The court below admitted (R. 9) that the

[11] Sections 452 and 463 (a) of title 28, U. S. C., each provide that "the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had".

respondent could have presented on appeal the same contention raised by his petition for habeas corpus, and—assuming the decision below to be correct on the merits—he could also have obtained his release by habeas corpus in the district court or in this Court. Issuance of the writ merely because "there is danger" that respondent cannot perfect his appeal or because the court is satisfied from his application for bail that "the appeal will succeed" seems, therefore, clearly to be the exercise of original rather than appellate jurisdiction.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

APRIL 1942.

APPENDIX

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Section 262 of the Judicial Code (28 U. S. C. § 377), provides:

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

28 U. S. C. §§ 451, 452 and 463 (a), relating to the power of courts to issue writs of habeas corpus, provide:

> Sec. 451. The Supreme Court and the district courts shall have power to issue writs of habeas corpus.

Sec. 452. The several justices of the Supreme Court and the several judges of the circuit courts of appeals and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

Sec. 463 (a). In a proceeding in habeas corpus in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had: *Provided, however,* That there shall be no right of appeal from such order in any habeas corpus proceeding to test the validity of a warrant of removal issued pursuant to the provisions of section 591 of Title 18 or the detention pending removal proceedings. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

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No. 79

In the Supreme Court of the United States

OCTOBER TERM, 1942

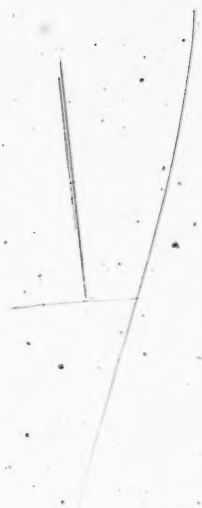
WILLIAM A. ADAMS, WARDEN OF THE CITY PRISON OF MANHATTAN, AND JAMES E. MULCAHY, UNITED STATES MARSHAL, PETITIONERS

v.

THE UNITED STATES OF AMERICA EX REL. GENE MCCANN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS



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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 79

WILLIAM A. ADAMS, WARDEN OF THE CITY PRISON OF MANHATTAN, AND JAMES E. MULCAHY, UNITED STATES MARSHAL, PETITIONERS

v.

THE UNITED STATES OF AMERICA EX REL. GENE McCANN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court below (R. 8–12) and the dissenting opinion of Judge Chase are reported in 126 F. (2d) 774.

JURISDICTION

The order of the circuit court of appeals was entered on March 31, 1942 (R. 13). The petition for a writ of certiorari was filed April 23, 1942, and was granted April 27, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Has a circuit court of appeals jurisdiction to entertain a petition for a writ of *habeas corpus* attacking a judgment of conviction from which an appeal is pending in that court?

2. May a person accused of a crime against the United States waive his right to the assistance of counsel and later, with the approval of the court and the District Attorney, waive his right to a trial by jury?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution and pertinent statutes are set forth in Appendix A, *infra*, pp. 53–55.

STATEMENT

Respondent was convicted on July 22, 1941, in the United States District Court for the Southern District of New York upon an indictment in six counts for using the mails to defraud, a violation of Section 214 of the Criminal Code, 18 U. S. C. 338, and was sentenced to imprisonment for six years and to pay a fine of $600 (R. 2). He appealed to the court below, and the trial court fixed his bail at $10,000 (R. 8). Upon application by respondent the court below reduced the bail to $1,500.[1] The appeal is still pending in that court.

[1] In its opinion in the *habeas corpus* proceeding, the court below stated that respondent's bail had been reduced to $1,000 (R. 8). This statement appears to be erroneous since, in a *per curiam* opinion on file with the clerk of the

which has from time to time extended the time for filing a bill of exceptions (R. 8).[2]

At the hearing on the application for a reduction in bail, the circuit court of appeals suggested to respondent that he file a petition for a writ of *habeas corpus* to test whether his conviction was void because he was not represented by counsel when he waived a trial by jury (R. 8; Appendix B, *infra*, pp. 56–57). Respondent filed such a petition, later superseded, in the circuit court of appeals.[3] This petition alleged that respondent was tried and convicted without assistance of counsel, and without being advised that he was entitled to such assistance, although he never waived his right thereto. The petition also alleged that respondent was not in a position to choose intelligently whether to be tried without a jury, that he was

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circuit court of appeals, written in connection with an earlier application for *habeas corpus* which the court considered as an application for a reduction in bail, the court ordered a reduction to $1,500 rather than $1,000. A copy of the *per curiam* opinion has been filed with the Clerk of this Court and is reprinted as Appendix B, *infra*, pp. 56–57.

[2] On April 9, 1942, the court below extended the time for filing a bill of exceptions until 90 days after the date upon which respondent is personally served with a copy of any order that may be made by this Court reversing the order of the court below in the *habeas corpus* proceeding. A copy of the order extending the time for filing a bill of exceptions has been filed with the Clerk of this Court and is reprinted as Appendix C, *infra*, pp. 58–62.

[3] A certified copy of this petition, which was superseded by the petition appearing at R. 2–3 has been filed with the Clerk of this Court and is reprinted as Appendix D, *infra*, pp. 63–67.

not advised in his choice by the court, the District Attorney, or counsel, and that the judge perfunctorily approved the waiver without familiarizing himself with the charge against respondent or advising respondent of the significance of his acts. (Appendix D, *infra*, pp. 63–67.) Upon this petition, Circuit Judge A. N. Hand issued a writ of *habeas corpus* returnable on March 12, 1941, before the circuit court of appeals.[4]

After the hearing on March 12, this first petition, which raised controversial issues of fact, was withdrawn and a new petition (R. 2–3) was filed which did not repeat the allegations made in the first petition that the waivers were unwitting and involuntary. Instead, the petition set forth only that the respondent did not have the assistance of counsel at any of the proceedings upon his indictment and that he was tried without a jury upon his own motion, the United States Attorney consenting thereto (R. 2).

To this second petition the marshal made a return (R. 4–7), setting forth the following facts concerning the trial of respondent:

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[4] Although Judge A. N. Hand signed the writ issued for the purpose of inquiring into the causes of the respondent's detention (R. 1), this was not a *habeas corpus* proceeding before a judge of a circuit court of appeals, authorized by 28 U. S. C. 452 and 463 (a), for the writ was made returnable before the court (R. 1) and was considered by the court *en banc* (R. 8), and the order made thereon was an order of the court (R. 13). Cf. *Carper* v. *Fitzgerald*, 121 U. S. 87.

When respondent was called upon to enter his plea to the indictment, the trial judge advised him to retain counsel, but respondent refused, "stating in substance that he desired to represent himself, that the case was very complicated, and that he was so familiar with its details that no attorney would be able to give him as competent representation as he would be able to give himself" (R. 4). When the case was called for trial, the trial judge inquired of respondent whether he had counsel and respondent repeated that "he desired to represent himself" for, although he was not admitted to the bar, "he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be" (R. 5). Various preliminary proceedings had been initiated by respondent prior to his trial and it also appeared that he had represented himself in extensive civil litigation (R. 5–6, 9).

Upon the trial, respondent moved to have the case tried by the judge without a jury. "There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney" (R. 5) following which respondent's motion was granted on consent of the Assistant United States Attorney. Thereafter respondent signed the following waiver which was consented to by the As-

sistant United States Attorney and approved by the district judge (R. 7):

> I, Gene McCann, the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the Court of my constitutional rights.

Respondent represented himself throughout the ensuing trial which extended for two and a half weeks. Upon conviction, he filed an appeal which he has attempted to perfect in person, although the trial court and appellate court each suggested to him at least once the advisability of retaining counsel (R. 5).

This return was not traversed.

The court below accepted the statement of facts in the return as accurate (R. 9–10) and, following argument on March 20, 1941, filed an opinion holding the conviction to be unlawful and directing that the respondent be released (R. 8–11). One judge dissented (R. 12). An order was entered directing that the respondent be released (R. 13)—

> upon condition that [he] the relator shall post bail with good and sufficient surety in the amount of $1,000 to secure his appearance to prosecute his appeal now pending in this Court * * * and also to secure his appearance for his further trial and prosecution in the United State District Court upon said indictment.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that it had jurisdiction to entertain the petition for a writ of *habeas corpus*.

2. In holding that, because respondent was not represented by counsel when he waived a trial by jury, respondent was unlawfully convicted.

3. In failing to dismiss the petition for a writ of *habeas corpus*.

4. In entering an order directing respondent's release.

SUMMARY OF ARGUMENT

I

The circuit court of appeals issued the writ of *habeas corpus* not as an auxiliary writ to prevent interference with its appellate jurisdiction but as a substitute for a pending appeal in order to void the conviction without awaiting preparation of a bill of exceptions.

The circuit court of appeals had no jurisdiction thus to substitute the extraordinary remedy of *habeas corpus* for the normal remedy of appeal. The circuit courts of appeals have power to issue only such writs as are "necessary for the exercise of their respective jurisdictions." Judicial Code, Sec. 262, 28 U. S. C. 377. Their jurisdiction is created by statute and is specifically limited "to review by appeal." Judicial Code, Sec. 128; 28 U. S. C. 225. It follows from the very words of

the statutes that the circuit courts of appeals have jurisdiction to issue only the original writs necessary to review by appeal, including *habeas corpus*, and may not enlarge their jurisdiction by substituting review by an original writ. This interpretation is supported by the great weight of authority.

Broader considerations point to the same conclusion. The familiar policies which deny review at interlocutory stages and which cause the courts to refuse to issue *mandamus*, prohibition, and *habeas corpus* when other remedies are available, call for the strict interpretation of Section 262. Congress has expressly confided to this Court and the district courts power to issue writs of *habeas corpus*; hence there is no constraint to find such power in the circuit courts of appeals. On the contrary, the power would be highly inconvenient, for the circuit courts of appeals have no facilities for hearing the cases in which *habeas corpus* is most appropriate—those involving disputed facts de hors the record. Respondent's remedy (assuming *habeas corpus* at this stage to be appropriate) was to apply for the writ to the district court or, possibly, to this Court, but not to the circuit court of appeals.

The same result obtains even if we assume to be correct the decisions holding that review in the circuit court of appeals by an original writ as a substitute for appeal is proper whenever the ex-

cumstances imperatively demand that form of intervention. In this case there was no showing of such circumstances.

II

There is no constitutional or other bar to the waiver of the right to a trial by jury by a defendant who is aware of his rights and capable of making an informed choice, even though the defendant has also waived his right to the assistance of counsel.

It is now settled that a defendant in a federal court may waive his right to a trial by jury and may be tried by the court. The right so to do is supported not only by this Court and many decisions of circuit courts of appeals, but has been implicitly recognized and approved by the Congress. And the historical language and background of the constitutional provisions relating to trial by jury establish that such trial is a right which may be waived by its beneficiary, and is not a mandatory requirement to be imposed against his will.

It is equally plain that the right to counsel may be waived. Since, therefore, a defendant may waive either of these rights, there is no warrant in authority or in logic for concluding that regardless of the circumstances he can never waive both rights in the same proceeding. Waiver of counsel does not preclude waiver of the right to a jury trial, nor does the Constitution require a de-

fendant who desires to be tried by the court to obtain counsel to effect the waiver. The controlling statutes confer upon an accused the power to manage his own cause; this power must carry with it the power to waive any constitutional privilege, including jury trial, when the accused deems such waiver to be to his advantage. Other questions arising in the course of a trial may call for much greater technical legal knowledge than the essentially practical judgment as to whether to be tried with or without a jury; no consideration of competence, therefore, warrants a distinction between the power of a defendant without counsel to waive his right to a jury trial, and his power to conduct his own cause for all other purposes.

The unquestionable right of a defendant who has intelligently waived counsel subsequently to plead guilty is a persuasive analogy. Since a defendant may plead guilty without counsel, it would seem to follow that he may do the lesser thing and waive only the right to a trial by jury. A trial court, in considering whether to make effective such a waiver, may appropriately take the waiver of counsel into account as an important factor. But there is no reason why in the circumstances presented by this case, the trial court cannot make effective a waiver of the right to a jury trial by a defendant who has deliberately chosen to be without counsel.

ARGUMENT

I

THE CIRCUIT COURT OF APPEALS HAD NO JURISDICTION TO ISSUE THE WRIT OF HABEAS CORPUS

Congress, when it created the circuit courts of appeals, did not extend to them the same power to issue writs of *habeas corpus* as had been conferred upon all other federal courts by Section 751 of the Revised Statutes.[5] The omission was not supplied in the Judicial Code or in the Act of February 13, 1925, although before either was enacted it had been authoritatively decided that the power could not be added by implication. See *Whitney* v. *Dick*, 202 U. S. 132.[6] But while Congress thus deliberately denied the circuit courts of appeals power to issue original writs of *habeas corpus* in independent proceedings, it did grant those courts some power to issue the writ by ex-

[5] Now found in 28 U. S. C. 451, *viz:* "The Supreme Court and the district courts shall have power to issue writs of *habeas corpus*."

[6] Prior to that decision it had been held by lower courts that the circuit courts of appeals had power to issue writs of *habeas corpus*. E. g., *Ex Parte Moran*, 144 Fed. 594 (C. C. A. 8). *Whitney* v. *Dick*, *supra*, however, has been followed consistently. *Sweetney* v. *Johnston*, 121 F. (2d) 445 (C. C. A. 9), certiorari denied, 314 U. S. 607; *In re Anderson*, 117 F. (2d) 939, 940 (C. C. A. 9); *DeMaurez* v. *Swope*, 110 F. (2d) 564 (C. C. A. 9); *Ferguson* v. *Swope*, 109 F. (2d) 152 (C. C. A. 9); *Smith* v. *Johnston*, 109 F. (2d) 152, 156 (C. C. A. 9); *Hall* v. *United States*, 78 F. (2d) 168, 170 (C. C. A. 10).

tending to them the power, first granted to all federal courts in Section 14 of the Judiciary Act of 1789 [7] and now found in Section 262 of the Judicial Code [8]—

> to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usage and principles of law.

Consequently, the court below had jurisdiction to issue the writ of *habeas corpus* only if its use was "necessary" to the exercise of its appellate jurisdiction.

We submit that there was no such necessity. The writ of *habeas corpus* was not issued to prevent or remove interferences with the jurisdiction of the circuit court of appeals. The writ was issued as a complete substitute for ordinary appellate procedure. This is apparent on the face of the opinion below.

In its opinion the circuit court of appeals stated that the respondent's difficulties in preparing a bill of exceptions might prevent it from reviewing the judgment of conviction on appeal and would certainly hamper it (R. 9). Had the circuit court of appeals then ordered respondent's release to the extent necessary to enable him to prepare his appellate papers, or to bring him before that court in

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[7] 1 Stat. 81.

[8] 28 U. S. C. 377.

connection with the hearing or disposition of his appeal, then the writ would in a true sense have been auxiliary to the proper exercise of the normal appellate jurisdiction. But the court below did more; in its opinion it held on the merits that the conviction was a nullity, and it directed that the respondent should be discharged from custody (R. 11).

The order entered by the court (R. 13), it is true, does not follow literally the logic of the opinion. The order provides that the respondent shall be released only upon condition that he post a bond of $1,000 to prosecute his appeal, and, if carried out literally, would accomplish nothing more than a bail order giving the assurance that, as far as the court below was concerned, the appeal would be successful. But that is not the fair intendment of the proceeding as a whole. The court below would not have indulged in such legal complexities for the simple purpose of effecting a $500 reduction in bail.* The order must be read in the light of the opinion and particularly of the statement that to enter a bail order releasing respondent without a bond would be inadequate because he would still be confronted with the necessity of perfecting his bill of exceptions (R. 9). The obvious intention was to direct that the respondent be released subject only to his posting bond to appear for a new trial

*An earlier order had fixed bail at $1,500. See p. 2, *supra*.

or to prosecute his appeal in the event that this Court should reverse the order releasing him.

This view, moreover, is supported by the court's order of April 9, 1942, extending respondent's time for filing a bill of exceptions "for a period of ninety (90) days from the personal service on the defendant-appellant of a copy of any order that may be made by the United States Supreme Court reversing the aforesaid order of this Court which granted the defendant-appellant's writ of *habeas corpus* and directed his discharge" (Appendix C, pp. 58–59, *infra*). It is entirely clear, therefore, that the court below issued the writ of *habeas corpus* as a substitute for a pending appeal in order to review, before the appeal was perfected, the validity of respondent's conviction upon a trial in which he waived both counsel and jury.[10]

[10] If the order of the court interpreted literally does sum up the total effect of the *habeas corpus* proceedings, then it is clear that the circuit court of appeals had no authority to proceed by *habeas corpus*. Upon that interpretation the effect of the order and opinion taken together is to admit respondent to bail and to inform him that his appeal will succeed upon the point raised by *habeas corpus*. This will aid respondent in preparing his bill of exceptions—especially if this Court decides the case on the merits—and therefore, in a sense, issuance of the writ will have forwarded the appeal and have been auxiliary to the court's exercise of its appellate jurisdiction. But to use the writ of *habeas corpus* for such a purpose is a perversion. *Habeas corpus* lies to free from custody a person whose confinement is unlawful and not to inform a convicted defendant how to prepare a bill of exceptions. Compare *McNally* v. *Hill*, 293 U. S. 131. The fact that the respondent may have been poor

The heart of the jurisdictional issue, therefore, is whether Section 262 empowers a circuit court of appeals to review upon a petition for *habeas corpus* a judgment of conviction from which an appeal is pending before it. Although there is no conflict upon this issue in respect of the writ of *habeas corpus*, there are differences of opinion, both in the judgments of this Court and in those of the circuit courts of appeals, concerning whether Section 262 authorizes the issuance of other original writs as complete substitutes for the normal appellate processes where the circumstances imperatively demand that form of intervention. See pp. 26–27, *infra*. This uncertainty concerning the scope of Section 262 has been recognized both by this Court and by circuit courts of appeals. *Ex parte Bakelite Corp.*, 279 U. S. 438, 448; *Ex parte Joins*, 191 U. S. 93, 102; *In re Eastman Kodak Co.*, 48 F. (2d) 125 (C. C. A. 3); *Pickwick-Greyhound Lines* v. *Shattuck*, 61 F. (2d) 485 (C. C. A. 10). In view of the inescapable analogy in this respect of one extraordinary writ to another, we shall discuss the general problem as well as the immediate question of the power to issue *habeas corpus*, and

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and lacked the aid of counsel is immaterial to this issue for if this be the case, he could appeal *in forma pauperis* and have counsel appointed. The extent to which the writ has been misused, if this interpretation of the order is correct, is sufficiently shown by the fact that the court holds on bail, to prosecute an appeal, a man whose conviction and resulting confinement it has already held to be unlawful.

shall show (A) that Section 262 grants to the circuit courts of appeals power to issue only such writs as are truly auxiliary and not substitutional; and (B) that even if the broader power exists in extraordinary cases, it was not called into being in the present case by any extraordinary circumstance.[11]

[11] We shall assume for the purposes of the present case that filing a petition for a writ of *habeas corpus* in this Court (compare *Ex parte Mirzan*, 119 U. S. 584, with *In re Sawyer*, 124 U. S. 200, and *Ex parte Terry*, 128 U. S. 289, 301–302) or in a district court, would have been an appropriate procedure for raising the issue of whether respondent was deprived of his constitutional rights by a trial, at his own deliberate request, without counsel and without jury. In other words, we shall assume that the conviction could be collaterally attacked on the grounds stated and that under the circumstances there would have been no abuse of discretion in issuing the writ, if the circuit court of appeals had had jurisdiction so to do.

We feel warranted in making this assumption for two reasons. First, in spite of considerable confusion in the whole body of the decisions of this Court, the recent decisions seem adequately to support the statement that "*if it be found* that the court had no jurisdiction to try the petitioner, or *that in its proceedings his constitutional rights have been denied, the remedy of habeas corpus is available.*" *Bowen* v. *Johnston*, 306 U. S. 19, 24 [italics added]. See, also, *Ex parte Lange*, 18 Wall. 163 (double jeopardy); *Callan* v. *Wilson*, 127 U. S. 540 (jury trial); *Ex parte Bain*, 121 U. S. 1 (indictment); *In re Nielsen*, 131 U. S. 176 (double jeopardy); *Hawaii* v. *Mankichi*, 190 U. S. 197 (jury trial); *Moore* v. *Dempsey*, 261 U. S. 86 (due process); *Johnson* v. *Zerbst*, 304 U. S. 458 (assistance of counsel). Contra: *Ex parte Harding*, 120 U. S. 782 (compulsory process to obtain witnesses); *In re Schneider*, 148 U. S. 162 (jury trial); *Andrews* v.

A. *The circuit courts of appeals have no power to review convictions by writ of habeas corpus*

The jurisdiction of the circuit courts of appeals is wholly statutory.[12] In ordinary civil and criminal cases, their jurisdiction is derived exclusively from Section 128 of the Judicial Code,[13]

[12] *Leimer* v. *State Mut. Life Assur. Co.*, 106 F. (2d) 793 (C. C. A. 8), appeal dismissed, 107 F. (2d) 1003; *In re Philadelphia & Reading Coal & Iron Co.*, 103 F. (2d) 901, 903 (C. C. A. 3); *United States* v. *Rayburn*, 91 F. (2d) 162, 164 (C. C. A. 8); *Fidelity & Casualty Co. of New York* v. *Darby*, 81 F. (2d) 229 (C. C. A. 3); *Emlenton Refining Co.* v. *Chambers*, 14 F. (2d) 104, 105 (C. C. A. 3), certiorari denied, 273 U. S. 731; cf. *Sumi* v. *Young*, 300 U. S. 251, 252.

[13] 28 U. S. C. 225.

(Note 11 continued:)

Swartz, 156 U. S. 272 (negroes barred from jury); *In re Belt*, 159 U. S. 95 (jury trial); *Matter of Moran*, 203 U. S. 96 (self-incrimination); *United States* v. *Valante*, 264 U. S. 563 (jury trial). Compare *Riddle* v. *Dyche*, 262 U. S. 333. Our second reason is that, the unavoidable question of jurisdiction aside, a decision by this Court would be so desirable to prevent confusion in the administration of the federal criminal law (see Petition for Certiorari, pp. 7–13) that we do not feel warranted in contending that issuance of the writ was an abuse of discretion.

We believe it appropriate to point out, however, that analysis of the decisions of this Court makes doubtful the propriety of *habeas corpus* at this stage in the proceedings against respondent. "The usual rule is that a prisoner cannot anticipate the regular course of proceedings having for their end to determine whether he shall be held or released, by alleging want of jurisdiction and petitioning for a *habeas corpus*." *Ex parte Simon*, 208 U. S. 144, 147. See also *In re Chapman*, 156 U. S. 211; *Riggins* v. *United States*, 199 U. S. 548; *In re Lincoln*, 202 U. S. 178; *Johnson* v. *Hoy*, 227 U. S. 245. Cf. *In re Frederich*, 149 U. S. 70; *Tinsley* v. *Anderson*, 171 U. S. 101; *Markuson* v. *Boucher*, 175 U. S.

which provides that "the circuit courts of appeals shall have appellate jurisdiction *to review by appeal* " final decisions" of the district courts. Thus, they have no general supervisory or appellate jurisdiction over the district courts, except in bankruptcy, an exception which emphasizes the withholding of general supervisory powers in other cases.[15] Consequently when Section 262 empow-

[14] Italics added.

[15] "The appellate jurisdiction appears to be limited to two methods of review—by appeal and writ of error". *In re Pacquet*, 114 Fed. 437 (C. C. A. 5). See also *Travis County v. King Iron Bridge & Mfg. Co.*, 92 Fed. 690 (C. C. A. 5); *United States v. Moy Yee Tai*, 109 Fed. 1 (C. C. A. 2). But cf. *Grable v. Killits*, 282 Fed. 185 (C. C. A. 6), certiorari denied, 260 U. S. 735.

(Note 11 continued:)

184; *Urquhart v. Brown*, 205 U. S. 179. Also, the opinion at the last term in *Waley v. Johnston*, 316 U. S. 101, suggests that *habeas corpus* should be reserved for cases in which appeal was not an adequate remedy; the Court said: "The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. *In such circumstances* the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to enter it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." [Italics added.]

If the above statement from *Waley v. Johnston* sets forth the full extent to which the writ of *habeas corpus* is available to raise constitutional rights, then the writ would seem to have been improperly issued in this case. The rule quoted

ered the federal courts to issue those writs not specifically provided for by statute "which may be necessary for the exercise of their respective jurisdictions" it must have been intended that the circuit courts of appeals should issue only the writs necessary "to review by appeal." By the very words of Sections 128 and 262, therefore, extraordinary writs may issue only when they are in truth auxiliary to appeals, or in aid of appeals, and not

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(Note 11 continued:)

above *Ex parte Simon*, *supra*, also might be invoked in the instant case, even if there were power to grant the writ. An appeal was pending. The record on appeal would show the bare facts relied upon to void the conviction—that respondent was not represented by counsel when he waived a jury trial. Respondent's difficulties in preparing a bill of exceptions might delay a decision on appeal and there is authority that delay is grounds for making an exception to the general rule. *In re Bonner*, 151 U. S. 242. But that decision appears to be contrary to the cases previously cited and to rest upon the circumstance that the sentence was a short one. Another fact, which the court below thought was exceptional, was that respondent might not be able to prepare a bill of exceptions adequate to show all the errors at the trial. It is certain, however, that a bill could be prepared to raise the question here presented on the merits. If the point were good, the inadequacies of the bill of exceptions in other respects would be immaterial. If the point is bad, respondent will be compelled, notwithstanding the issuance of the writ, to prepare the best bill he can. The writ of *habeas corpus*, therefore, did no more than save respondent the trouble of preparing his bill of exceptions. And, since every appellant is put to that task, the only exceptional circumstance in respondent's case (and it does not appear in the pleadings) is that the stenographic transcript has not been typed out because he lacked money to buy it. It may be

where it is sought to use them in lieu of the ordinary appellate processes.[18]

This apparent meaning of Sections 128 and 262 is confirmed by the contrast between the statutory provisions governing the circuit courts of appeals and the statutory provisions applicable to this Court. Both exercise only appellate jurisdiction

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[18] Illustrations of the jurisdiction conferred by Section 262 to issue writs in aid of and auxiliary to appeals are contained in the following cases:

Mandamus: McClellan v. Carland, 217 U. S. 268 (to compel district court to proceed to a decision; *Ex parte United States*, 287 U. S. 241 (to compel issuance of a bench warrant); *United States* v. *Malmin*, 272 Fed. 785 (C. C. A. 3) (to compel judge to take office and perform duties); *In re Watts*, 214 Fed. 80 (C. C. A. 2) (to compel entry of final judgment); *Application of Sorini*, 4 F. (2d) 802 (C. C. A. 9) (to compel allowance of writ of error); *Muma* v. *Bodine*, 16 F. (2d) 463 (C. C. A. 3) (to compel allowance of appeal); *Petition of Zeno*, 14 F. (2d) 418 (C. C. A. 1), certiorari denied, 273 U. S. 737 (to compel intermediate appellate court to hear appeal); *In re Beckwith*, 203 Fed. 45 (C. C. A. 7), certiorari denied, 227 U. S. 678 (to compel observance of decree).

Prohibition: United States v. *Mayer*, 235 U. S. 55 (to prevent district court from vacating a decree from which appeal is pending); *Ex parte Equitable Trust Co.*, 231 Fed. 571 (C. C. A. 9) (to prevent allowance of intervention which would delay the principal suit).

Certiorari: The Margaret B. Roper, 106 Fed. 740 (C. C. A. 4) (to compel inclusion of certain documents in record on appeal).

Habeas Corpus: See *Muir* v. *Chatfield*, 255 Fed. 24 (C. C. A. 2). Compare pp. 12–13, *supra*.

(Note 11 continued:)
doubted whether the additional trouble which respondent faced would justify departure from the general rule above stated. See also pp. 33–35, *infra*.

except in rare cases.[17] Both have power under Section 262 to issue all writs necessary to the exercise of their respective jurisdictions. But this Court, and not the circuit courts of appeals, has been authorized in express and specific terms to issue writs of prohibition to district courts in admiralty,[18] *mandamus* to all federal courts,[19] and *habeas corpus*.[20] This Court has frequently exercised the power to review void convictions upon *habeas corpus*, in cases which could not otherwise come before it, thus substituting review upon an original writ for review upon appeal or writ of error.[21] If Section 262, which is derived from Section 14 of the Judiciary Act of 1789, had

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[17] U. S. Const., Art. III, Sec. 2. *United States* v. *Mayer*, 235 U. S. 55.

[18] Judicial Code, Sec. 234, 28 U. S. C. 342.

[19] *Ibid.*

[20] R. S. 751, 28 U. S. C. 451: "The Supreme Court and the district courts shall have power to issue writs of habeas corpus.". See also R. S. 752, 28 U. S. C. 452.

[21] E. g. *Ex parte Watkins*, 3 Pet. 191; *Ex parte Yerger*, 8 Wall. 85; *Ex parte Siebold*, 100 U. S. 371; *In re Belt*, 159 U. S. 95.

In such cases the Court exercised appellate jurisdiction by the original writ because it reviewed the action of an inferior court. The appellate jurisdiction is not limited by the Constitution to appeals and writs of error but may be exercised by any form of process permitted by statute. *Ex parte Yerger*, 8 Wall. 85; *Ex parte Virginia*, 100 U. S. 339, 341. But the Court cannot issue the writ of *habeas corpus*, unless the detention is pursuant to order of an inferior court, except in cases within the original jurisdiction defined by Article III, Sec. 2. *Ex parte Watkins*, 3 Pet. 191; *Ex parte Hung Hang*, 108 U. S. 552.

carried the power to make such substitutions in the interests of more efficient review, then the express provisions would have been supererogatory. Conversely, if Congress had desired the circuit courts of appeals to review upon prohibition, *mandamus*, or *habeas corpus* where an appeal was inadequate, it would have followed the same course as it did in respect to this Court and would have granted the circuit courts of appeals the express power to issue writs of prohibition, *mandamus*, and *habeas corpus* instead of limiting them to "review by appeal" and to the use of writs necessary to the exercise of that jurisdiction.

For the most part the courts have construed Section 262 in accordance with its words, holding that original writs would issue thereunder only in aid of ordinary appellate processes and not as an alternative mode of exercising a general supervisory jurisdiction. In *Whitney* v. *Dick*, 202 U. S. 132, this Court held that the circuit courts of appeals were not authorized to issue original and independent writs of *habeas corpus*.[22] Section 262 (then R. S. 716) was pressed upon the Court and an argument made, which several circuit courts of appeals had adopted, that the circuit courts of appeals under that section could issue all the writs issued by this Court in the

[22] *Whitney* v. *Dick*, *supra*, also involved a question whether certiorari would issue out of a circuit court of appeals. As to that branch of *Whitney* v. *Dick*, see p. 29, *infra*.

exercise of its appellate jurisdiction. See *In re Buskirk*, 72 Fed. 14, 22 (C. C. A. 4); *Ex parte Moran*, 144 Fed. 594 (C. C. A. 8). The argument was rejected (202 U. S. at 136):

> * * * Cases may arise in which the writ of *habeas corpus* is necessary to the complete exercise of the appellate jurisdiction vested in the Circuit Court of Appeals. But it is unnecessary to speculate under what circumstances such an exigency may exist, for the writ asked for here was an independent and original proceeding challenging *in toto* the validity of a judgment rendered in another court. There was no proceeding of an appellate character pending in the Court of Appeals for the complete exercise of jurisdiction in which any auxiliary writ of *habeas corpus* was necessary. * * *[22]

Thus, *habeas corpus* will issue from the circuit court of appeals only when it is auxiliary to other proceedings. An exigency making its use appropriate might arise if a convicted defendant were held *incommunicado* pending appeal or if a warden refused to free him upon reversal of the conviction, for the writ would aid the appellate process by making consultation with counsel possible in preparation of the appeal in the one case

[22] But it seems that an appeal might have been taken, as here, to the same circuit court of appeals as that in which *habeas corpus* was sought.

and by giving effect to the appellate decree in the other. But *habeas corpus* will not issue where it is not auxiliary to review by appeal but is in fact, as here, an independent proceeding substituted for an appeal as a challenge to the judgment.

This interpretation of *Whitney* v. *Dick* (which accords with the plain words of Sections 128 and 262) was expressly adopted by the court below in *Muir* v. *Chatfield*, 255 Fed. 24 (C. C. A. 2),[24] and from the time of *Whitney* v. *Dick* until the present case, circuit courts of appeals had uniformly denied all applications for a writ of *habeas corpus ad subjiciendum*. E. g., *In re Anderson*, 117 F. (2d) 939, 940 (C. C. A. 9); *DeMaurez* v. *Swope*, 110 F. (2d) 564, 565 (C. C. A. 9); *Ferguson* v. *Swope*, 109 F. (2d) 152 (C. C. A. 9); *Smith* v. *Johnston*, 109 F. (2d) 152, 156 (C. C. A. 9); *Hall* v. *United States*, 78 F. (2d) 168, 170 (C. C. A. 10). See also *Ex parte Lamar*, 274 Fed. 160, 162 (before a single circuit judge), affirmed, 260 U. S. 711; *Ex parte Craig*, 282 Fed. 138, 143–144 (C. C. A. 2), affirmed 263 U. S. 255.

[24] "Reference to analogous legislation in respect to the writ of habeas corpus confirms the foregoing views. Section 751, U. S. Rev. Stat., confers the right to issue the writ *ad subjiciendum* upon the Supreme Court and the District Courts. But the Circuit Court of Appeals, having only appellate jurisdiction, is without power to grant the writ in this form (*Whitney* v. *Dick*, 202 U. S. 132), though it may in other forms, as *ad testificandum* or *ad respondendum*, necessary to

This interpretation of *Whitney* v. *Dick* also accords with the majority of decisions interpreting Section 262 as applied to civil cases. Whenever this Court has held that Section 262 authorized a circuit court of appeals to issue an extraordinary writ, it has been careful to point out just how the jurisdiction to review by appeal was aided. See *McClellan* v. *Carland*, 217 U. S. 268, 279, 280 (*mandamus*); *United States* v. *Mayer*, 235 U. S. 55 (prohibition); *Delaware, L. & W. R. Co.* v. *Rellstab*, 276 U. S. 1 (*mandamus*). The circuit courts of appeals quite generally have held that they "have no power to issue the writ by virtue of the fact alone that they have appellate jurisdiction to review judgments and decrees of the District Courts, but that the exercise of that jurisdiction rests upon the fact that the issuance thereof is *auxiliary to and is necessary for the protection of*

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the exercise of its appellate jurisdiction." 255 Fed. 24, 27 (C. C. A. 2).

A similar view was expressed by Chief Justice Marshall in *Ex Parte Bollman*, 4 Cranch 75, 98-99. Section 14 of the Judiciary Act of 1789, 1 Stat. 81, gave power to the courts "to issue writs of *scire facias*, *habeas corpus*, and all other writs * * * *which may be necessary for the exercise of their respective jurisdictions* * * *." It was held that the italicized clause did not limit the Court in issuing *habeas corpus* to the issuance of auxiliary writs because that clause modified only the words "all other writs". In the course of the opinion it was said that the opposing construction would limit the use of the writ chiefly to *habeas corpus ad testificandum*.

the jurisdiction of the appellate court which issues the same" (*Hammond Lumber Company* v. *United States District Court*, 240 Fed. 924, 927–928 (C. C. A. 9)) (italics added). Accord: *Muir* v. *Chatfield*, 255 Fed. 24 (C. C. A. 2); *In re Gilbough*, 13 F. (2d) 462 (C. C. A. 2) (but cf. *Ex parte Edelstein*, 30 F. (2d) 636 (C. C. A. 2), certiorari denied, 279 U. S. 851); *Dooley Improvements* v. *Nields*, 72 F. (2d) 638 (C. C. A. 3); *Raritan Copper Works* v. *Elliott*, 271 Fed. 284 (C. C. A. 3) (but cf. *In re Eastman Kodak Co.*, 48 F. (2d) 125 (C. C. A. 3)); *In re Pacquet*, 114 Fed. 437 (C. C. A. 5); *Travis County* v. *King Iron Bridge & Mfg. Co.*, 92 Fed. 690 (C. C. A. 5); *In re Eilers Music House*, 284 Fed. 815, 818 (C. C. A. 9), certiorari denied, 257 U. S. 646; *Shell Oil Co.* v. *District Court*, 70 F. (2d) 394 (C. C. A. 9); *Keaton* v. *Kennamer*, 42 F. (2d) 814 (C. C. A. 10). Compare *Pickwick-Greyhound Lines* v. *Shattuck*, 61 F. (2d) 485 (C. C. A. 10).

As we indicated above (see p. 15, *supra*), there is also a contrary line of decisions expressing the view that such original writs as prohibition, *mandamus*, certiorari, and *habeas corpus* may issue from circuit courts of appeals under Section 262 "where the right of appeal exists, but because of the presence of 'circumstances imperatively demanding,' a departure from the ordinary remedy by * * * appeal is necessary." *Minnesota & Ontario Paper Co.* v. *Molyneaux*, 70 F. (2d)

545 (C. C. A. 8). Accord: *In re Lisman*, 89 F. (2d) 898 (C. C. A. 2); *Grable* v. *Killits*, 282 Fed. 185 (C. C. A. 6), certiorari denied, 260 U. S. 735; *Greyerbiehl* v. *Hughes Electric Co.*, 294 Fed. 802 (C. C. A. 8), certiorari denied, 264 U. S. 589; *Whittel* v. *Roche*, 88 F. (2d) 366 (C. C. A. 9). These cases sprang from occasional statements by this Court to the effect that Section 262 affords to it ample opportunity for using the common law writ of certiorari, not only as auxiliary process, but also, whenever there is imperative necessity, as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways. See e. g., *In re Chetwood*, 165 U. S. 443; *Whitney* v. *Dick*, 202 U. S. 132;[25] *United States* v. *Beatty*, 232 U. S. 463.

But the statements relied upon apparently sprang from an error in reading the statute and, even on other authoritative decisions alone, must be rejected as erroneous interpretations of Section 262. The earliest statement is found in *In re Chetwood*, 165 U. S. 443. In that opinion Chief Justice Fuller referred to Section 262 (then R. S. 716) but quoted it erroneously as providing that the federal courts may "issue all writs, not specifically provided for

[25] *Whitney* v. *Dick*, *supra*, involved both *habeas corpus* and certiorari. It is noteworthy that the suggestion that there was a broad power in exceptional cases "imperatively demanding that form of interposition" was confined to the discussion of the writ of certiorari.

by statute, which may be agreeable to the usages and principles of law"; thus, he omitted the critical requirement that the writs be "necessary for the exercise of their [the courts'] respective jurisdictions" (p. 462). Then the opinion, without further discussion, states that "whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice." The statement was far broader than the case required. As was pointed out shortly after in *In re Tampa Suburban Railroad Company*, 168 U. S. 583, 587, the writ issued in the *Chetwood* case was truly auxiliary, for it brought up certain ancillary contempt orders which, by punishing an attorney for prosecuting a writ of error, interfered with the jurisdiction of this Court on the writ of error. See also *United States* v. *Dickinson*, 213 U. S. 92, 101. Moreover, the *dictum* was contrary to the previous decisions of the Court. Although at common law certiorari had been used, first, to reexamine the action of inferior tribunals and, second, to obtain information upon a matter before an appellate tribunal, it was early held unequivocally that in this Court certiorari could be used only for the second purpose. *United States* v. *Young*, 94 U. S. 258; *Ex parte Vallandigham*, 1 Wall. 243; *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 380. See *United States* v. *Rauch*, 253 Fed. 814 (S. D. N. Y.) per Hough, C. J.

The weight gained by the *Chetwood dictum* through repetition is not enough to overbalance its dubious origin and unfaithfulness to the statutory language. The entire *dictum*, including the erroneous quotation of the statute, was quoted in *Whitney* v. *Dick*, 202 U. S. 132, 139, to show that Section 262 at the most would sanction certiorari only in extraordinary cases, and it was restated in substantially the same words in *United States* v. *Beatty*, 232 U. S. 463, 467, although the writ was not issued. See also *McClellan* v. *Carland*, 217 U. S. 268, 278–279; *In re 620 Church St. Corp.*, 299 U. S. 24, 26.[26] But the only instances in which this Court has actually issued certiorari under Section 262, as an independent and not as an auxiliary writ, have been cases which were already improperly before the Court on appeal or certiorari under Section 240 of the Judicial Code. *McClellan* v. *Carland*, 217 U. S. 268; *Meeker* v. *Lehigh Valley R. R. Co.*, 234 U. S. 749; *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282; *Spiller* v. *Atchison, T. & S. F. Ry.*, 253 U. S. 117.[27] And even this use of certiorari ap-

[26] The statement was also cited with approval in *Turner* v. *United States*, 14 F. (2d) 360, 361 (C. C. A. 8); *Greyerbiehl* v. *Hughes Electric Co.*, 294 Fed. 802, 805–806 (C. C. A. 8); *Minnesota & Ontario Paper Co.* v. *Molypeaux*, 70 F. (2d) 545, 546 (C. C. A. 8); *Blake* v. *District Court*, 59 F. (2d) 78, 79 (C. C. A. 9).

[27] *In re 620 Church St. Corp.*, 299 U. S. 24, and *Holiday* v. *Johnston*, 313 U. S. 342, are instances in which certiorari was issued under Section 262 to bring up cases which could not otherwise come before the Court because leave to appeal had

parently was much affected by the analogy to the statutory writ by which this Court reviews the judgments and decrees of the circuit courts of appeals (compare *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 385; *Forsyth* v. *Hammond*, 166 U. S. 506, 513; *United States* v. *Gulf Ref. Co.*, 268 U. S. 542, 545) so that it may be doubted whether the writ could have been used for such purposes had Section 262 stood alone. See *United States* v. *Dickinson*, 213 U. S. 92. We submit, therefore, that the *Chetwood* dictum and the decisions following it cannot be regarded as controlling interpretations of Section 262 as regards the powers of the circuit courts of appeals, but must be set aside as aberrations from the true interpretation adopted in the line of decisions discussed first above.[23]

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been denied by the circuit court of appeals. The denial of leave to appeal prevented the Court from exercising its normal appellate authority and therefore certiorari would issue to remove the obstruction and make possible the exercise of the appellate jurisdiction. A close analogy is the use of *mandamus* to compel a district court to proceed in the case before it. See e. g., *McClellan* v. *Carland*, 217 U. S. 268.

[23] The above-cited decisions of this Court in which common-law certiorari was issued, as an independent writ in lieu of ordinary appellate processes, have no present significance, for Section 240 as amended by the Act of February 13, 1925, now permits the Court to bring before it any case in a circuit court of appeals.

The cases in which this Court has issued writs of prohibition do not support either interpretation. As Mr. Justice Van Devanter pointed out in *Ex parte Bakelite Corp.*, 279 U. S. 438, "The power of this Court to issue writs of

Broader considerations than either the words of Section 262 or the applicable precedents also support the view that writs issued by the circuit courts of appeals under Section 262 must be auxiliary to review by appeal. The familiar policies which deny review at interlocutory stages [29] and cause the courts to refuse to issue *mandamus*,[30] prohibition,[31] and particularly *habeas corpus*,[32] when other remedies are available, call for a strict interpretation of Section 262. Such an interpretation leaves ample play in the judicial system to care for extravagant and unforeseeable cases. This Court

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prohibition never has been clearly defined by statute or by decisions." Compare *Ex parte Joins*, 191 U. S. 93, 102. Section 234 of the Judicial Code, 28 U. S. C. 342, gives express power to issue the writ only when it is directed to courts of admiralty and at one time it seemed settled that the writ could be issued only in the admiralty cases specifically covered by statute. *Ex parte Christy*, 3 How. 292, 322; *Ex parte Graham*, 10 Wall. 541. The Court has, however, frequently issued prohibition to other courts. E. g., *In re Rice*, 155 U. S. 396; *Ex parte Oklahoma*, 220 U. S. 191; *Ex parte United States*, 226 U. S. 420; *In re Labor Board*, 304 U. S. 486. The statutory basis for issuance of the writ in these cases was not made clear, but they may be explained on the ground that *mandamus* will also correct excesses of jurisdiction (see *Ex parte Oklahoma*, 220 U. S. 191, 209) so that the substance of both writs is covered by the express authority to issue writs of *mandamus* granted by Section 234.

[29] See *Cobbledick v. United States*, 309 U. S. 323, 324–326.

[30] *Ex parte Perry*, 102 U. S. 183; *Ex parte Nebraska*, 209 U. S. 436; *Ex parte American Steel Barrel Co.*, 230 U. S. 35.

[31] *In re Huguley Mfg. Co.*, 184 U. S. 297; *Ex parte Oklahoma*, 220 U. S. 191; *Ex parte Riddle*, 255 U. S. 450.

[32] See p. 16, n. 11, *supra*.

has wide powers to issue *mandamus*, prohibition, and *habeas corpus* under express statutory provisions. (See p. 21, *supra*.) The result of denying the power to the circuit courts of appeals would be to focus in one appellate court the power to grant extraordinary remedies departing from the normal judicial processes.[33] At the same time, Section 262 would retain under our interpretation ample scope to permit the circuit courts of appeal to check interferences with their appellate jurisdiction.[34]

This interpretation works no injustice as applied specifically to writs of *habeas corpus*. Appeals are not always adequate to remedy cases of unlawful detention pursuant to court order; for that reason Congress expressly confided power to issue such writs to this Court, and to the district courts with a right of appeal to the circuit court of appeals. Adequate provision for the protection of personal liberty having thus been made, there is no constraint to enlarge the powers of the circuit courts of appeals. Cf. *Whitney* v. *Dick*, *supra*, 135. The latter courts have no convenient facilities for conducting hearings and making findings of fact in accordance with statute (*Walker* v. *Johnston*, 312 U. S. 275; *Holiday* v. *Johnston*, 313 U. S. 342); yet the cases most ap-

[33] The paucity of cases arising in this Court under Section 234 of the Judicial Code and Section 751 of the Revised Statutes indicates that there would be no burdensome increase in the cases coming before this Court.

[34] See p. 20, n. 16, *supra*.

propriate for *habeas corpus* are those in which the facts relied upon are dehors the record. See *Waley* v. *Johnston*, 316 U. S. 101. It would scarcely be suggested that in the present case the circuit court of appeals could properly have issued the writ if no appeal had been taken or if the time for perfecting the appeal had expired. The case stands upon no different footing because technically an appeal was pending. Respondent's remedy was to perfect his appeal or (assuming the case at this stage to call for the writ) to apply to the district court, or perhaps to this Court, for *habeas corpus;* [35] but not to the circuit court of appeals.

B. *Even if the circuit courts of appeals have the necessary power in extraordinary cases, the court below lacked power in this case to issue a writ of habeas corpus*

Respondent's case would stand no better if we were to assume that Section 262 authorized a circuit court of appeals to review a conviction by writ of *habeas corpus* whenever circumstances "imperatively demand" a departure from the normal process of review by appeal. In his petition respondent did not plead any unusual cir-

[35] Ordinarily applications for *habeas corpus* must be made to the district court, *Ex parte Mirzan*, 119 U. S. 584, but where, as here, the order of commitment was entered by the very court to which application would have to be made, this Court has accepted the petition. *In re Sawyer*, 124 U. S. 200; *Ex parte Terry*, 128 U. S. 289, 301–302.

cumstances and the return refers to none. No evidence appears to have been offered. Consequently, on the record made, it seems plain that *habeas corpus* was used as a substitute for an appeal simply because it would make preparation of a bill of exceptions unnecessary. It is settled that such a showing does not avoid the general rule (*Whitney* v. *Dick*, 202 U. S. 132, 140–141) and it follows, therefore, that the court below was without jurisdiction to entertain the petition.

The same result obtains even if we go outside the record in search of extraordinary circumstances. The court below found such circumstances in the respondent's unusual difficulty in preparing his bill of exceptions. But the writ did not improve the respondent's position in this respect. As the court below stated, he could have prepared a sufficient bill to present the question whether he was lawfully tried without a jury (R. 9). If the conviction was held unlawful on this ground, either in *habeas corpus* or on appeal, any other errors committed during the course of the trial would be immaterial and the inadequacy of the bill of exceptions to present those errors would be unimportant. If the point is bad, the respondent is forced back on his bill of exceptions regardless of whether the decision comes in *habeas corpus* or on appeal. The only consequence, therefore, of entertaining the writ of *habeas corpus* was to enable the respondent to bring up one point in advance without the neces-

sity of preparing the best bill of exceptions which the circumstances permitted. The advantages of such a course to respondent are obvious but they are not peculiar to the present case; on the contrary, to appeal their points one at a time would aid many defeated litigants. Respondent's case differs only in that he has no stenographic transcript so that, apparently, preparation of the bill of exceptions is taking an unusually long time. But although this might be a factor on an application for bail, it is not a circumstance "imperatively demanding" a departure from the course specified by Congress.

II

A DEFENDANT WHO IS AWARE OF HIS RIGHTS AND CAPABLE OF MAKING AN INTELLIGENT CHOICE MAY BE PERMITTED TO WAIVE A TRIAL BY JURY WITHOUT THE ADVICE OR ASSISTANCE OF COUNSEL

Even if it be held that the court below, in the circumstances of this case, had the power to entertain the petition for a writ of *habeas corpus*, the issuance of the writ was not warranted by the merits of the petition.

This branch of the case presents the bare question whether a trial court may in a felony case ever accept a waiver of a jury trial from a defendant who has deliberately refused to be represented by counsel. The course of the pleadings in the court below shows the purpose to eliminate all factual questions and to present this question, as the court below said, "in the barest possible form" (R. 10).

Respondent withdrew his original petition which had alleged that he was not advised of his right to counsel and that the trial court had accepted the waiver of jury trial perfunctorily (Appendix D, *infra*, pp. 63–67). The present petition alleges simply that respondent did not have the assistance of counsel at any stage of the proceedings and that upon his own motion he was tried without a jury (R. 2). The marshal's return was not traversed. The court below accepted as accurate the facts set forth in the return (R. 9–10).[36] In view of this course of the proceedings it cannot now be questioned that in waiving counsel, and subsequently in waiving trial by jury, respondent made a deliberate choice.[37] Although advised by the court to obtain counsel, he twice insisted that he was better able to represent himself than an attorney could (R. 4–5). Respondent was no helpless stranger to the law and the courts; he had studied law sufficiently, in his own opinion, "adequately to defend himself" (R. 5) and indeed he had represented himself in extensive civil litigation (R. 5–6). At the trial, it was respondent himself who, although advised of his constitutional rights, moved to have the case tried by the judge without a jury (R. 2, 5, 7).

[36] Cf. *Walker* v. *Johnston*, 312 U. S. 275, 284.

[37] In his brief filed in this Court at the last term prior to the appointment of counsel, respondent sought to argue the questions of fact raised by his first petition for *habeas corpus*.

Neither the Constitution nor any rule of law requires that respondent be permitted a new trial in the hope of escaping the consequences of the procedure which he knowingly initiated and upon which he knowingly insisted. An accused who is represented by counsel may waive a trial by jury with the approval of the court. And it has been consistently held that an accused may waive his right to the assistance of counsel and conduct his own defense. There is no reason why these two waivers may not, in appropriate situations, be exercised in the same case. An accused who is conducting his own case has, and should have, we submit, the same powers to insist upon or waive constitutional rights, including the right to trial by jury, as defendants represented by counsel.

1. In *Patton* v. *United States*, 281 U. S. 276, this Court resolved the doubts previously existing [28] concerning whether a defendant in a criminal case could waive the right to trial by jury guaranteed by Article III, Section 2, and the Sixth Amendment of the Constitution. The precise issue in the *Patton* case was whether the accused could waive a trial by twelve jurors and be tried by eleven. The United States urged that the Constitution did not preclude an express waiver of the entire jury (Br. for the United States, No. 53, October Term, 1929, pp. 7–47),

[28] E. g., *Thompson* v. *Utah*, 170 U. S. 343, 353; *Low* v. *United States*, 169 Fed. 86, 91 (C. C. A. 6).

and this Court held that it was logically required to decide the issue as thus broadly posed (pp. 290–293). After exhaustive analysis, the Court concluded that the right to a trial by jury guaranteed by the Constitution could be waived. The Court pointed out, however, that the power of a defendant to waive his right to a jury trial did not include power to insist upon trial to the court, and that, after the waiver was made, the trial court should determine the manner of trial in the exercise of an informed discretion.

Despite the intimations of the court below (R. 10–11) we assume that the Court will not in this case wish to reexamine the broad conclusion of the *Patton* case. The right of an accused to waive his right to trial by jury, provided there is compliance with the safeguards prescribed in the *Patton* case, is now woven into the fabric of our criminal procedure. The practice of trying criminal cases to the court was specifically called to attention of Congress when it amended the Criminal Rules Act in 1934 and Congress impliedly approved the practice.[39] The Criminal Rules rec-

[39] The Act of February 24, 1933, c. 119, 47 Stat. 904, provided that the Court should have power to prescribe rules of practice and procedure with respect to proceedings after verdict but made no mention of jury-waived cases. The Department of Justice feared that some question might arise as to whether the rules prescribed would cover jury-waived cases and requested that the statute be amended so that the rules would surely cover both jury and jury-waived cases. See S. Rep. 257, 73rd Cong., 2d Sess.; H. Rep. 858, 73rd Cong., 2d Sess. Accordingly by Act of March 8, 1934, c. 49, 48 Stat.

ognize that juries may be waived. See Rules and Forms in Criminal Cases, 292 U. S. 659, 669, 670. The inferior courts have repeatedly held that in appropriate circumstances waiver is permissible. *Ferracane* v. *United States*, 47 F. (2d) 677, 679 (C. C. A. 7); *Jabczynski* v. *United States*, 53 F. (2d) 1014, 1015 (C. C. A. 7); *Brouse* v. *United States*, 68 F. (2d) 294 (C. C. A. 1); *Irvin* v. *Zerbst*, 97 F. (2d) 257, 258 (C. C. A. 5); *Spann* v. *Zerbst*, 99 F. (2d) 336 (C. C. A. 5); *Brown* v. *Zerbst*, 99 F. (2d) 745, 746 (C. C. A. 5); *United States* v. *Brunett*, 53 F. (2d) 219, 226 (W. D. Mo.); cf. *United States* v. *Streul*, 99 F. (2d) 474, 478 (C. C. A. 2); *Hagner* v. *United States*, 54 F. (2d) 446, 448 (App. D. C.), affirmed, 285 U. S. 427. Commentators have almost unanimously approved the *Patton* case, both as a matter of law and as a matter of policy.[39]

Even if the question were one of first impression, it would seem clear that the Constitution does not

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399, the statute was amended to provide that the Court might prescribe rules with respect to "proceedings after verdict, or finding of guilt by the court if a jury has been waived, or a plea of guilty". See also Act of June 29, 1940, c. 445, 54 Stat. 688.

This legislation is a complete answer to any argument that, even though an accused may waive his constitutional right, legislative sanction is required before the courts may try the accused without a jury.

[39] E. g., Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 Mich. L. Rev. 695 (1927); Bond, *The Maryland Practice of Trying Criminal Cases by Judge Alone, Without Juries*, 11 A. B. A. Journal 699 (1925); Grant, *Felony Trials Without a Jury*, 25 Am. Pol. Sci. Rev. 980 (1931).

prohibit acceptance of a waiver of jury trial." The language of Article III, Section 2, of the Constitution, providing that "The Trial of All Crimes, except in Cases of Impeachment, shall be by Jury; * * *" should be interpreted in the light of the Sixth Amendment, which provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." Read together these provisions create not a mandatory requirement of a trial by jury to be imposed against the will of a defendant, but a right to such a trial, to be enjoyed or waived by the intelligent choice of the accused. Cf. *Schick* v. *United States*, 195 U. S. 65, 71–72, *Belt* v. *United States*, 4 App. D. C. 25, 35–36; Cf. also *Guild* v. *Frontin*, 18 How. 135; *Campbell* v. *Boyreau*, 21 How. 223.

The historical background of the constitutional provisions supports the view, if support now be needed, that their purpose was to create a right and not to impose a requirement. The guaranties of jury trial were intended for the benefit of the accused; there is nothing to indicate an intention of the framers to impose trial by jury on the accused against his will in all cases. See Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 Va. L. Rev. 655 (1934). And indeed, there is considerable evidence to show

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"The argument that some statute or public policy forbids acceptance of the waiver is now foreclosed. See p. 38, n. 39, *supra*.

that waiver of trial by jury with a resulting trial by the court were fairly frequent practice in colonial times and when the Constitution was adopted. Grinnell, *To What Extent is the Right to Jury Trial Optional in Criminal Cases in Massachusetts?* 8 Mass. Law Quarterly, No. 5, pp. 7, 15–38 (1923); Bond, *op. cit. supra* at pp. 699–701; Griswold, *op. cit. supra* at pp. 657–669; *Commonwealth* v. *Rowe*, 257 Mass. 172. In these circumstances, recognition of the right of waiver in cases where the defendant deemed it to his interest to exercise that right could not have been regarded by the framers of the Constitution as inconsistent with the institution of trial by jury.

The right may be waived by those for whose benefit it is intended. Other rights conferred by the Fifth, Sixth, and Seventh Amendments have generally been held to be susceptible of waiver. (See pp. 43–44 *infra*.) There is no reason why this right should be regarded as standing upon any different footing, for, contrary to the suggestion of the court below (R. 10–11), this Court has clearly indicated that the right to trial by jury is no more fundamental in the administration of the criminal law than other rights guaranteed by the Constitution. See *Palko* v. *Connecticut*, 302 U. S. 319, 325; *Schick* v. *United States*, *supra*; cf. *In re Bolt*, 159 U. S. 95, 99.[42]

[42] In *Palko* v. *Connecticut*, *supra*, this Court stated that the right to trial by jury is not "so rooted in the traditions and

2. It is established that an accused may waive the assistance of counsel, provided he does so intelligently and competently and not in ignorance of his constitutional rights. *Johnson* v. *Zerbst*, 304 U. S. 458, 465. In the instant case, the respondent, though urged several times to retain counsel, repeatedly refused and insisted that no attorney could give him as adequate representation "as he would be able to give himself" (R. 4–5, 9–10). There can, therefore, be no contention that respondent was deprived of any constitutional right by being permitted, at his own request, to act as his own attorney.

3. The court below concluded that although an accused may waive representation by counsel, if he does so he completely loses the privilege, which a defendant with counsel has, of waiving his right to a jury trial and asking the court to permit a trial without a jury. We submit that a person acting as his own counsel must have the same control over his case as one represented by counsel and that such a person may exercise the same privileges, including that of waiving a jury trial

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conscience of our people as to be ranked as fundamental.' • • • Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without" it. The Court further observed that the right to a jury trial does not rise to the same "plane of social and moral values" as the right to the assistance of counsel which is "implicit in the concept of ordered liberty" (pp. 325, 326). But cf. *Jacob* v. *New York City*, 315 U. S. 752.

with the consent of the court and the prosecuting attorney.

The Sixth Amendment gives to defendants the right "to have the assistance of counsel." It nowhere suggests that one who prefers to conduct his own defense shall have less power to waive constitutional rights than would his attorney. That the defendant is entitled to manage his own cause personally to the same extent as through an attorney appears from the language of the controlling provision of the Judiciary Act of 1789 (Sec. 35, 1 Stat. 73, 92), now contained in Section 272 of the Judicial Code (36 Stat. 1164, 28 U. S. C. 394). That section provides that—

> In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

This statute was adopted contemporaneously with the Sixth Amendment and must be regarded as consistent with it. Since it permits a party to manage his own cause personally *or* by the assistance of counsel, it clearly indicates that a party not represented by counsel has the same powers as one who is so represented.

This contemporary statutory indication is reenforced by consideration of the unfairness inherent in circumscribing by any rigid formula

the powers of an accused who is managing his own cause. A defendant with counsel may waive many of his constitutional rights if he deems it to his advantage to do so. He may waive the privilege against being twice placed in jeopardy;[43] he may take the witness stand and be cross-examined;[44] he may waive his right to a "speedy trial";[45] his right to be tried in "the state [and district] where the said crimes shall have been committed";[46] and his right "to be confronted with the witnesses against him."[47] Normally, these rights are an advantage to a defendant but there are circumstances in which it may be to his advantage to waive any one or more of them; for example, it is frequently of great importance that a defendant should take the witness stand and waive his privilege against self-incrimination. To deny to a defendant who has waived counsel the right to seek the advantages of any of these waivers whenever he deems it wise would be for the courts to deny him the right to manage his own case as effectively as a defendant who is represented by counsel. The Constitution impels no such result and the statute would seem to forbid it.

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[43] *Trono* v. *United States*, 199 U. S. 521.

[44] *Fitzpatrick* v. *United States*, 178 U. S. 304, 315.

[45] *Pietch* v. *United States*, 110 F. (2d) 817, 819 (C. C. A. 10), certiorari denied, 310 U. S. 648.

[46] *Haefner* v. *United States*, 54 F. (2d) 446, 447–449 (App. D. C.), affirmed, 285 U. S. 427.

[47] *Diaz* v. *United States*, 223 U. S. 442; *Grove* v. *United States*, 3 F. (2d) 965 (C. C. A. 4), certiorari denied, 268 U. S. 691.

Nor for present purposes can any valid distinction be drawn between the right of an accused to seek acceptance of his waiver of these other constitutional guarantees which are normally relied upon in criminal proceedings and his right, with the court's permission, to waive a jury trial. For just as there are, as we have noted, appropriate circumstances in which it may be to the advantage of the accused to waive his other rights, so unquestionably there are circumstances in which it may be to his advantage to dispense with his right to a jury trial, and ask to be tried by the court. Where there is accusation of a revolting or brutal offense, or of a crime where popular prejudice has outrun the law, or where a speedy trial is particularly imperative, or—as may likely have been the case here—where the defense is complicated and technical and the defendant believes he may be distrusted by a jury,[48] waiver of the right to a jury may be of large importance to an accused. Grant, *Felony Trials Without a Jury*, 25 Am. Pol. Sci. Rev. 980, 991–993 (1931); Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 Mich. L. Rev. 695, 713–715 (1927); Frank, *Trying Criminal Cases Without Juries in Maryland*, 17 Va. L. Rev. 253, 261–262 (1931); Perkins, *Proposed Jury Changes in Criminal Cases*, 16 Iowa L. Rev. 223,

[48] In this case this may well have been respondent's view since in a civil case involving the same or similar transactions the jury had decided against him. *McCann* v. *New York Stock Exchange*, 107 F. (2d) 908 (C. C. A. 2).

224–225 (1931). Thus, it has been concluded that "there are cases where it is a positive injustice to deny the defendant the right to waive a jury, where the right to refuse to be 'tried by one's country' is as valuable a right as that to trial by jury". Grant, *op. cit. supra,* at p. 994. See also Oppenheim, *op. cit. supra,* at p. 696.[49] If this be so, and we believe that it is, a defendant should not be deprived of a choice which otherwise is his, simply because he exercises his right to dispense with an attorney.

Nor is a defendant acting without counsel so incapable of making an intelligent decision on the question of waiver of his right to a jury trial as to justify withholding from him all power of choice. Initially it should be noted that there is nothing in the record of this case to indicate that the absence of counsel and of jury resulted in any injustice or, indeed, any mistake in strategy which might have been avoided had there been a jury; nor has respondent suggested that the course of the trial would have been different if he had been tried by a jury or if he had been advised by counsel whether to waive his right. But the decision below seems to assume that, because some defendants

[49] In fact it has been pointed out that a Connecticut statute permitting waiver of trial by jury, enacted in 1874, was repealed in 1878 upon the argument that it was designed to aid criminals. Maltbie, *Criminal Trials Without a Jury in Connecticut*, 17 J. of Crim. Law 335, 338 (1926).

might act more wisely in determining whether to waive their right to a jury trial if represented by counsel, all should be forbidden to do so at all without legal advice. The same reasoning would apply to almost any decision which a defendant is called upon to make during the course of a trial. Questions concerning the advisability of making various available motions concerning the admissibility and presentation of evidence, and concerning the waiver of other privileges, all present problems calling for more technical legal knowledge than the essentially practical judgment concerning whether a defendant is likely to fare better at the hands of a judge than at the hands of twelve lay jurors. And errors in such technical matters are likely to be at least as prejudicial to a defendant as the choice of one impartial fact-finding body over another. Indeed, to hold that a conviction must be set aside if a defendant exercises his own judgment concerning any matter with respect to which a lawyer may have superior knowledge would mean, in effect, that a defendant could do nothing without legal assistance and would thus effectively destroy his statutory right to handle his own case in his own way without the intervention of counsel. If defendants are to be allowed to plead and manage their own causes, they must be permitted to make their own decisions, whether or not consultation with an attorney might have led to the choice of a different course.

The majority of the court below, however, while stating that as an original matter it might not have treated as a critical circumstance the absence of counsel in waiver of jury trial, expressed its view that the decisons of this Court in *Johnson* v. *Zerbst*, 304 U. S. 458, and *Glasser* v. *United States*, 315 U. S. 60, compelled the conclusion that a defendant appearing *pro se* cannot waive his right to a jury trial. But while both cases show plainly that full effect will be given to the constitutional guarantee of the right to have the effective assistance of counsel, and while both insist upon a careful judicial scrutiny of a purported waiver of such assistance, neither reaches the issue involved in the instant case and neither is decisive of it. The *Johnson* case holds only that the Sixth Amendment protects defendants against trial without counsel where they have been inadequately apprised of their constitutional rights and that it must clearly appear that a defendant has in fact been informed of his rights so that he can make an informed choice concerning their waiver. Similarly, the *Glasser* case holds that a clear showing is necessary before a defendant will be deemed voluntarily to have waived his right to the effective assistance of counsel. The record is plain in the instant case (*supra*, pp. 35–36), that these several requirements of a true waiver have been fulfilled.

While we have been unable to find any cases determining the precise issue involved in this

case,[50] we submit that a persuasive analogy in support of our position is the power of a defendant to plead guilty and thus waive his right to a trial altogether, without the assistance of counsel. So long as a defendant is sufficiently apprised of his constitutional rights, a conviction based upon a plea of guilty made without the benefit of advice of counsel will not be set aside. *Williams* v. *Sanford*, 110 F. (2d) 526 (C. C. A. 5), certiorari denied, 310 U. S. 643; *Harpin* v. *Johnston*, 109 F (2d) 434 (C. C. A. 9), certiorari denied, 310 U. S. 624; *Moore* v. *Hudspeth*, 110 F. (2d) 386, 388 (C. C. A. 10), certiorari denied, 310 U. S. 643; *Buckner* v. *Hudspeth*, 105 F. (2d) 396, 397 (C. C. A. 10), certiorari denied, 308 U. S. 553; *Cundiff* v. *Nichol-*

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[50] In *Dillingham* v. *United States*, 76 F. (2d) 36, the Circuit Court of Appeals for the Fifth Circuit indicated that if a defendant understood his rights, he could waive trial by jury even though he was without the assistance of counsel. Although the court held that the defendant in that case had been deprived of constitutional rights, it stated (p. 39):

"When, as here, defendant brings up a record which shows that he has not had the trial by jury which the Constitution guarantees, if waiver is relied on for affirmance, particularly if the waiver has been given, without advice of counsel of his own selection, the record must clearly show that the waiver was formally and legally obtained upon a full explanation and understanding of his rights. * * *"

In at least two states, waiver of a jury trial by a defendant without counsel has expressly been held to be permissible. *Berry* v. *State*, 61 Ga. App. 315, 6 S. E. (2d) 148 (1939); *People* v. *Thompson*, 41 Cal. App. (2d) Sup. 965, 108 P. (2d) 105 (1940).

son, 107 F. (2d) 162 (C. C. A. 4); *Franzeen* v. *Johnston*, 111 F. (2d) 817, 820 (C. C. A. 9); *McCoy* v. *Hudspeth*, 106 F. (2d) 810, 811 (C. C. A. 10); *Wilson* v. *Hudspeth*, 106 F. (2d) 812, 813 (C. C. A. 10); *Pers* v. *Hudspeth*, 110 F. (2d) 812, 813 (C. C. A. 10); *Blood* v. *Hudspeth*, 113 F. (2d) 470, 471 (C. C. A. 10); *Cooke* v. *Swope*, 28 F. Supp. 492 (W. D. Wash.), affirmed, 109 F. (2d) 955 (C. C. A. 9); *Zeff* v. *Sanford*, 31 F. Supp. 736 (N. D. Ga.), affirmed, *Sanford* v. *Zeff*, 114 F. (2d) 1018 (C. C. A. 5); *Erwin* v. *Sanford*, 27 F. Supp. 892 (N. D. Ga.). And although this Court has never expressly ruled that a conviction based upon a plea of guilty made by a defendant without counsel will not *ipso facto* be set aside, a necessary implication of *Walker* v. *Johnston*, 312 U. S. 275, is that such a conviction is valid. For an issue in that case was whether the defendant who had pleaded guilty had voluntarily waived his right to assistance of counsel in making such plea (p. 286). Plainly if the defendant could not have pleaded guilty without counsel, the issue of voluntary waiver of the right to counsel would have been immaterial.

If, therefore, a defendant may plead guilty after having waived his right to counsel, and we believe it plain that he may, it seems clear that in appropriate circumstances a defendant who has waived counsel may also waive his right to a jury trial. For the

plea of guilty has, of course, much more serious consequence to a defendant than the waiver of jury trial. It has the effect of waiving not only the jury but the trial itself and any possible defenses which might have been raised. The plea of guilty "is tantamount to a waiver, not only of the right to counsel, but of the right to trial by a jury." *Cooke* v. *Swope,* 28 F. Supp. 492, 494 (W. D. Wash.), affirmed 109 F. (2d) 955 (C. C. A. 9). It would seem to follow, *a fortiori,* that if a defendant may lawfully plead guilty without advice of counsel he may waive the lesser right to a jury trial. Cf. *Patton* v. *United States,* 281 U. S. 276, 294–295, 304–305.

For these reasons, we think that a defendant has the power to waive his right to jury trial, and that his unwillingness to seek or accept legal advice in no way affects that power. A party has the inherent right to manage his cause in the manner he deems best, and the right should not be curtailed solely by reason of his desire to do without legal assistance. While it may be thought that a defendant who insists upon waiving both counsel and his right to trial by jury is not acting in his own interest, it cannot be said that the Constitution prohibits the waiver.

The remaining question is whether the trial court, acting under the duty enjoined upon it in the *Patton* case to determine whether to make

effective a defendant's waiver of his right to a jury trial, should always refuse trial to the court in the case of a defendant who has no counsel. We submit that no such general rule should be established. Under the *Patton* case the trial court has the power, of course, to determine the method of trial, equally in the case of a defendant with counsel and in the case of a defendant managing his own cause. In each case the trial court must satisfy itself that the defendant knows what his rights are, knows the implications of his choice, and is competent to make a choice at all. In addition, before the waiver is made effective, the trial court must determine that the interests of justice—the interests of the public and of the individual accused—will be served by departing from the normal course of trial by jury. Undoubtedly, the trial court will scrutinize the proposed waiver of a jury more searchingly where a defendant has no counsel than it will when an experienced member of the bar joins the district attorney in representing that a trial to the court is desirable. There may even be cases where a trial court may appropriately accept a waiver of jury trial from a defendant who has counsel, where it would reject such a waiver from a defendant who had chosen to conduct his own cause. But there is no requirement that the trial court must invariably refuse to make effective a waiver from a defendant without counsel; and in this case, there is no indication

whatever that the circumstances did not warrant the trial court's exercise of its discretion in accepting the waiver.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the court below should be set aside.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
ARCHIBALD COX,
RICHARD S. SALANT,
Attorneys.

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APPENDIX A

Article III, Section 2; Clause 3, of the Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Section 272 of the Judicial Code (28 U. S. C. § 394).

> In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are

permitted to manage and conduct causes therein.

Section 262 of the Judicial Code (28 U. S. C. § 377), provides:

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

28 U. S. C. §§ 451, 452, and 463 (a), relating to the power of courts to issue writs of habeas corpus, provide:

> SEC. 451. The Supreme Court and the district courts shall have power to issue writs of habeas corpus.
>
> SEC. 452. The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> SEC. 463. (a) In a proceeding in habeas corpus in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit

wherein the proceeding is had: *Provided, however,* That there shall be no right of appeal from such order in any habeas corpus proceeding to test the validity of a warrant of removal issued pursuant to the provisions of section 591 of Title 18 or the detention pending removal proceedings. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

APPENDIX B

United States Circuit Court of Appeals for the Second Circuit

UNITED STATES, APPELLEE;

v.

GENE MCCANN, APPELLANT

Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

PER CURIAM: The papers submitted by the appellant cannot be treated as an application for habeas corpus as there is no petition for a writ. We have, however, considered them as an application to reduce bail; as such we reduce the bail to $1,500. The appellant may, if he wishes, have a writ of habeas corpus issued out of this court upon a duly verified petition stating the circumstances by virtue of which he asserts he was improperly deprived of a trial by jury. The warden of the City Prison is requested to allow him access to a notary public to verify such a petition after it has been prepared presumably by the attorney who filed the brief now before us. That writ may be made returnable on March 16th, and a copy of the petition and any supporting brief should be in the hands of the district attorney on or before March 11th. However, it is only fair to remind the appellant that if he is released on bail, he will not be entitled to any writ of

habeas corpus; and that in that event he will have to wait until the appeal is heard to raise the question as to the deprivation of his right of trial by a jury. *Stallings* v. *Splain*, 253 U. S. 339, 343.

A true copy.

(S) D. E. ROBERTS, *Clerk*.

APPENDIX C

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, City, County and State of New York, on the 8th day of April 1942

Present: Honorable Learned Hand, Honorable Thomas W. Swan, United States Circuit Court Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GENE MCCANN, DEFENDANT-APPELLANT

Order

Upon the annexed petition of Gene McCann, the defendant-appellant herein; upon the decision of this Court, dated March 27th 1942, granting his application for a writ of habeas corpus and directing that he be discharged; upon the order of this Court, dated March 31st 1942, made and entered upon the said decision and directing that the defendant-appellant be forthwith released from custody upon condition that he post bail in the amount of $1,000.00 to secure his appearance to prosecute his appeal herein and for the further trial and prosecution upon the indictment; upon the Act of Congress of February 11th 1938, authorizing and directing the Wardens of the places wherein Federal prisoners are held in custody to

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administer oaths of such prisoners upon papers to be filed in Federal Courts; upon Rule 15 of the General Rules of this Court; and sufficient reason appearing therefor, it hereby is

ORDERED that the time within which the defendant-appellant herein can serve and file an amended assignment of errors and perfect, settle, and file his bill of exceptions and record on appeal in the Court below and in this Court and for all other purposes be and the same hereby is extended for a period of ninety (90) days from the personal service on the defendant-appellant of a copy of any order that may be made by the United States Supreme Court reversing the aforesaid order of this Court which granted the defendant-appellant's writ of habeas corpus and directed his discharge.

(Sgd.) LEARNED HAND,
(Sgd.) THOMAS W. SWAN,
C. JJ.

United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
v.
GENE MCCANN, DEFENDANT-APPELLANT

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

GREETINGS:

GENE MCCANN, the defendant-appellant in the above-entitled cause respectfully shows as follows:

1. On February 18th 1941 an indictment was returned against me by the January 1941 Grand Jury for the District Court for the Southern District of New York. The indictment charges six distinct violations of Section 338, Title 18, U. S. Code—using the mails to defraud. The cause came on for trial on July 7th 1941 before the Honorable Merrill E. Otis, District Court Judge from Missouri, presiding as a visiting Judge in the Southern District of New York. On July 22nd 1941, I was found guilty on all counts by the said Judge, presiding without a Jury, and sentenced to a total of six years and a $600.00 fine.

2. On July 28th 1941, the 27th having fallen on a Sunday, I duly served and filed a notice of appeal.

3. Under respective orders of this and the Court below, the Term of this and of that Court and the time within which I can perfect said appeal and for all other purposes has been duly extended to May 9th 1942.

4. In a decision by this Court, dated March 27th 1942, it granted my application for a writ of habeas corpus wherein it directed that I be discharged and on March 31st 1942 an order was made by this Court upon said decision directing that I be forthwith discharged from custody upon condition that I post bail in the amount of $1,000.00 to secure my appearance to prosecute my appeal herein and for the further trial and prosecution upon the indictment.

5. I defended this cause and was prosecuting the appeal therein in person. Pursuant to respective orders of the Court below and of this Court I defended and was prosecuting the appeal as a poor person. I am unable to post or secure the bond required for my release from custody.

6. The United States Attorney has informed this Court that he is seeking permission of the Attorney General to file a petition for certiorari in the Supreme Court with respect to this Court's decision granting my application for a writ of habeas corpus and directing that I be discharged.

7. In the event the Supreme Court denies the certiorari and or thereafter affirms the decision of this Court the perfection of my appeal herein will be unnecessary.

8. At the place of my custody, I am denied the use of a stapler, the use of pen and ink and access to a Notary Public or Warden before whom I can acknowledge this petition, the latter required by the Act of Congress of February 11, 1938, authorizing and directing the Wardens of places wherein Federal prisoners are held in custody to administer oaths for such prisoners in connection with papers to be filed in Federal Courts.

WHEREFORE, I respectfully pray that this Court, upon my indelible pencil signature affixed hereto, make the annexed order, pursuant to its General Rule 15, and direct its Clerk to staple the pages together and mail a certified copy thereof to me

that I may cause the same to be filed in the office of the Clerk of the Court below.

Dated, New York, N. Y., April 7th 1942.

(Sgd.) GENE McCANN,
Gene McCann,

Defendant-Appellant pro se., City Prison of Manhattan,
Fourth Floor, 125 White Street, New York City.

COUNTY OF NEW YORK,
State of New York, ss:

GENE McCANN, being duly sworn, deposes and says: I have made, read and know the contents of the aforesaid petition and the same is true of my own knowledge.

Sworn to before me this —— day of April 1942.

(Sgd.) GENE McCANN,
Gene McCann.

APPENDIX D

United States Circuit Court of Appeals, Second Circuit

UNITED STATES OF AMERICA, EX REL GENE MCCANN, PETITIONER, FOR A WRIT OF HABEAS CORPUS

v.

WILLIAM A. ADAMS, WARDEN OF CITY PRISON OF MANHATTAN, 125 WHITE STREET, NEW YORK CITY, AND/OR THE UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, RESPONDENTS

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

GREETINGS:

The Petitioner, Gene McCann, respectfully shows and alleges:

FIRST: That your petitioner was indicted on or about February 18th, 1941, by the Grand Jury in the District Court of the United States in and for the Southern District of New York, charging six distinct violations of Title 18, Section 338, of the U. S. Code, to wit, using mails to defraud. The matter came on for trial on July 7th, 1941, before the Honorable Merrill E. Otis, District Court Judge from Missouri, presiding as a visiting judge in the Southern District of New York. On July 22nd, 1941, your petitioner was found

guilty by the aforesaid Judge without a jury on all counts and was sentenced to a term of three years on each of the first three counts to run concurrently and three years on each of the last three counts to run concurrently with each other but not concurrently with the sentence on the first three counts. In effect, the total sentence amounts to six years and a fine of $600.00.

SECOND: That at no time during all of the aforesaid proceedings in connection with the aforesaid matter was your petitioner advised or apprized by the Court, Judge Otis, the United States Attorney nor by anyone else, nor was the petitioner aware of his statutory and constitutional rights to the assistance and advice of counsel, nor did the petitioner at any time expressly or impliedly waive such rights or assistance of counsel, nor did the Court below or Judge Otis at any time offer to assign counsel to assist the petitioner in the defense of the felonies charged in the indictment, or advise petitioner that he should or could have counsel therefor. Your petitioner appeared before the Court in all of the proceedings and proceeded to trial without the benefit or protection of counsel and ignorant of his right to the same, and sought to establish his innocence to the best of his ability, because of his inability to defray the cost of competent counsel.

THIRD: That on or about July 7th, 1941, at the commencement of the trial aforesaid before Judge Merrill E. Otis, your petitioner waived a jury trial upon the indictment aforesaid, charging the felonies aforesaid, and proceeded to trial without a jury. That an extract from the Court Clerk's

Minutes of the proceedings upon the trial of this cause reveals the following:

July 7th, 1941: Room 318.
Mathias F. Correa, U. S. Attorney, by Richard J. Burke.
Gene McCann, Pro se.
Honorable Merrill E. Otis, District Court Judge, Presiding.

Defendant moves to waive trial by jury and the Court to decide issues of fact. Motion Granted on consent of U. S. Attorney.

Your petitioner personally, and without the aid and advice of counsel, and without the aid or advice of the United States Attorney or the Assistant thereof, and without the aid or advice of the Trial Judge or anybody else, consented to the waiver of a jury trial and proceeded to trial and conviction and sentence without a jury. Your petitioner signed a stipulation waiving a jury trial but was never advised either of his rights or of the significance of his acts. The proceedings had in connection therewith were extremely perfunctory. Judge Otis without familiarizing himself with the gravemen of the case or of the defense or of the serious nature of the charge confronting the petitioner ordered a waiver of a jury trial and permitted your petitioner to proceed to trial without counsel or the assistance of counsel and without a jury. The aforesaid Judge did not advise your petitioner of any statutory or constitutional rights to counsel and to a trial by jury with all the traditional safeguards incidental thereto, nor was your petitioner sufficiently familiar with all the facts or in a position where your petitioner could make an intelli-

gent determination. The waiver was permitted by the trial court as a mere matter of rote without the exercise of sound and advised discretion, necessary to sanction such an unreasonable and undue departure from the mode of trial by jury, normal in cases of this character.

FOURTH: Your petitioner submits that the failure to advise your petitioner of his right to counsel violated the principle set forth in Johnson v. Herbst, 304 U. S. 458, and that your petitioner at no time waived the right to counsel. It is further submitted that the conditions precedent necessary to waive a jury in a felony case as set forth in Patton vs. United States, 281 U. S. 276, were not complied with and that the alleged waiver of the jury was ineffectual and that all proceedings had in connection with the instant indictment, to wit, the trial without a jury, the judgment of conviction and sentence were a nullity.

FIFTH: That the cause or pretense of such imprisonment of petitioner is the aforesaid Judgment of Conviction and Sentence thereon; that the said confinement, imprisonment and restraint are illegal and that the same deprives the petitioner of his liberty without due process of law and the detention is violative of the prisoner's rights to his liberty pursuant to the Constitution of the United States and the State of New York wherein he is now detained; that the order of committment and the confinement and detention are void and illegal and violates the provisions of the Federal and State Constitutions relative to due process of law.

SIXTH: That no application for a Writ of Habeas Corpus on the grounds stated herein has been made.

WHEREFORE your petitioner prays that a Writ of Habeas Corpus issue herein directed to the persons mentioned above, and that upon the return thereof an order be made herein directing that the petitioner be released from his imprisonment and custody of the United States officers now detaining him.

GENE MCCANN.

Witnessed by Mary Joy.

STATE OF NEW YORK,
County of New York, ss:

MARY JOY, being duly sworn, deposes and says that she resides at 683 East 140th Street, in the Borough of Bronx, City and State of New York.

That she is over the age of 21 years, and that she is a stenographer in the office of Frank J. Walsh, Esq., attorney for petitioner in the within proceeding. That on the 12th day of March 1942, at the City Prison of Manhattan, located at 125 White Street, New York, she saw petitioner Gene McCann sign the within petition. That deponent states that the signature affixed to said petition is a genuine signature of Gene McCann, the petitioner herein.

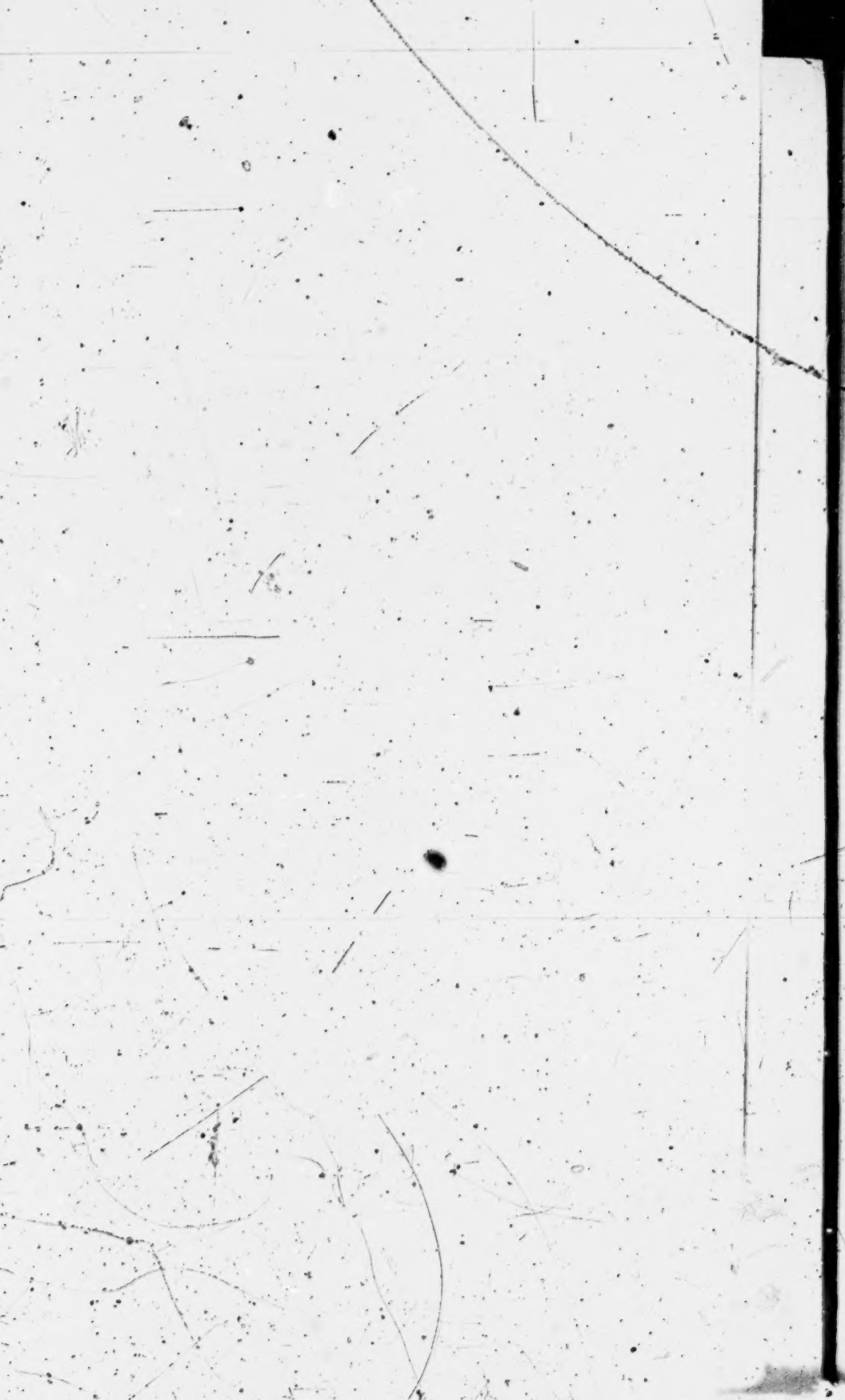
MARY JOY.

Sworn to before me this 12th day of March, 1942.

CHARLES CAVANNA,
Notary Public, N. Y. County.

Comm. Expires March 30, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942



IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 79

WILLIAM A. ADAMS, Warden of the City Prison of Manhattan, and JAMES E. MULCAHY, United States Marshal,

Petitioners,

v.

THE UNITED STATES OF AMERICA, *ex rel.* GENE McCANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT

ROBERT G. PAGE,
Attorney for Respondent.

EDWARD D. WYNOT,
of Counsel.

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In the

Supreme Court of the United States

October Term, 1942

No. 79

William A. Adams, Warden of the City Prison of Manhattan, and James E. Mulcahy, United States Marshal,

Petitioners,

v.

The United States of America, *ex rel.* Gene McCann,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the court below (R. 8-11) and the dissenting opinion of Judge Chase (R. 12) are reported in 126 F. (2d) 774, 776.

Jurisdiction

The order of the Circuit Court of Appeals was entered on March 31, 1942 (R. 13). The petition for certiorari, filed on April 23, 1942, was granted on April 27, 1942.

The jurisdiction of this Court is found in Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case

The respondent was indicted on February 18, 1941 by a Grand Jury sitting in the Southern District of New York, the indictment charging, in six counts, violation of Section 215 of the Criminal Code (U. S. Code, Title 18, Sec. 338) (R. 2). He was tried by a judge without a jury, and without the assistance of counsel (R. 2). He was convicted on July 22, 1941, and sentenced to imprisonment for six years and to pay a fine of $600 (R. 2).

The respondent thereupon appealed to the court below, the trial judge fixing the bail at $10,000 (R. 8). Although the court below reduced the bail to $1,500 (Government's Brief, Appendix B) in March, 1942, the respondent remained in custody from the time of this conviction until after the entry of the order here challenged (R. 8 and Government's Brief, Appendix C). Respondent was without funds with which to pay the stenographer for typing the minutes of the trial (R. 8), which lasted about two and one-half weeks (R. 5). Without such minutes, as the court below found, respondent had been unable to prepare any bill of exceptions, it was unlikely that any could be made up, and any bill so settled would "be an unsatisfactory record of what took place at the trial" (R. 8).

Although in custody, and without funds and without counsel, and unable to prepare a bill of exceptions, respondent attempted, in various motions before the court below, to establish the injustice of his conviction and to make it possible successfully to prosecute his appeal. Thus he obtained from the court below the right to prosecute his appeal in *forma pauperis* (Government's

Brief, Appendix C, p. 62); he obtained from the court below various orders from time to time extending his time to file a bill of exceptions (R. 8); and he made various other applications, not shown by the record or referred to in the Government's Brief, for orders directing those having custody of respondent to permit the use of facilities needed to perfect the appeal, an order directing the Government to make a copy of the minutes of the trial available to respondent, and so forth.

The sympathies of the court below were evidently aroused as it became familiar with the case. On one of the motions made by respondent, the court entered the per curiam order and opinion of March 5, 1942, printed as Appendix B to the Government's brief, in which it invited respondent to "have a writ of habeas corpus issued out of this court upon a duly verified petition stating the circumstances by virtue of which he asserts he was improperly deprived of a trial by jury." (See also R. 8.)

Respondent accordingly filed in the court below a petition for a writ of habeas corpus; it is printed as Appendix D to the Government's brief. It contained allegations to the effect that at no time was respondent advised by the trial judge, the United States Attorney or by anyone else, of his right to the assistance of counsel; that the trial judge did not offer to assign counsel to assist the respondent; that respondent was ignorant of his right to counsel, and represented himself because he could not pay the charges of competent counsel; that in waiving a jury trial respondent acted without the advice of counsel, and without knowledge of his rights and of the significance thereof; and that the waiver was sanctioned by the trial judge as a matter of rote, without knowing the facts and without exercising any discretion.

As the Government's brief points out (p. 4), this first petition was withdrawn. It was withdrawn at the sug-

gestion of the court below, which indicated the possibility that the case might be disposed of on a straight question of law and therefore suggested a reframing of the petition to eliminate certain allegations of fact. The new petition (R. 2-3) shows only that respondent, from the date of the indictment through the trial, acted without benefit of counsel; that respondent is not an attorney; and that respondent waived a jury trial on his own motion, signing a stipulation to that effect which was "So Ordered" by the trial judge.

The return to the writ (R. 4-6) admits the allegations of the new petition mentioned above, alleges in general terms that respondent waived his right to counsel with full knowledge of the significance of such act (paragraph 3 of the return—R. 4) and then proceeds to set forth in some detail the Government's version of the proceedings before the trial judge upon which the Government relies as showing an intelligent waiver by respondent of his right to counsel and of his right to a trial by jury (Return, paragraphs 4-9, R. 4-5). It concludes with some allegations as to respondent's experience in representing himself in various civil actions—all of which were lost by the respondent—for the purpose of showing respondent's "intelligence, experience, and familiarity with courts and legal proceedings, as bearing upon the legality of his waiver of the rights to representation by counsel and a trial by jury" (Return, paragraph 12, R. 5-6).

The return to the writ was not traversed, for the reasons indicated above, and the facts alleged in the return stand admitted for the purpose of the present proceeding. The facts so shown, with respect to the waiver of constitutional rights by the respondent, are:

On the adjourned arraignment date, upon refusal of respondent to plead, the District Court ordered a plea of not guilty to be entered and advised respondent to

retain counsel to defend himself which respondent refused to do, stating that he wanted to represent himself as the case was very complicated and he was so familiar with the details that no attorney would be able to give him as competent representation as he would be able to give himself (R. 4).

On the call of the case for trial in calendar part, the trial judge asked the respondent whether he had counsel; respondent replied that he desired to represent himself; in response to a question from the court, respondent said he was not admitted to the bar but had studied law and was sufficiently familiar therewith adequately to defend himself and was more familiar with the complicated facts of his case than any attorney could be (R. 5).

As to the waiver of the trial by jury, the return shows only that the motion to waive the jury was made by respondent, that there was "a brief discussion" between the court, the respondent, and the Assistant United States Attorney, at which it was determined that the Assistant United States Attorney should prepare the form of waiver, and that the waiver annexed to the return and approved by the court stated that respondent had been "advised by the Court of my constitutional rights" (R. 5, 7).

The court below, one judge dissenting, filed an opinion in which it decided that the conviction was unlawful and directed that the respondent be released (R. 8-11). The order entered, however, directed that the respondent be released "upon condition that the relator post bail * * * to secure his appearance to prosecute his appeal now pending in this Court * * *, and also to secure his appearance for his further trial and prosecution in the United States District Court upon said indictment" (R. 13). That order is challenged here.

Summary of Argument

I

Although the order here questioned, read literally, amounts to nothing more than an order releasing the respondent on bail, conditioned to prosecute his appeal in the court below, it should be considered in the light of the opinion below and in connection with other proceedings below. We agree with the Government that, so considered, the order is properly to be construed as an order releasing the respondent, subject only to his posting bail to appear for a new trial of the indictment or to prosecute his appeal below, if this Court should reverse the order below. If, however, this Court thinks that the order must be construed literally as an order merely reducing bail, then the writ of certiorari was improvidently granted and it should be dismissed.

II

The Circuit Court of Appeals, having acquired jurisdiction of the case by the filing of an appeal, had power to issue the writ of habeas corpus under Section 262 of the Judicial Code, since the issue of the writ was necessary and appropriate for the complete exercise of its jurisdiction. Section 262 empowers the Circuit Courts of Appeals, like the Supreme Court and the District Courts, to issue all writs "necessary for the exercise of their respective jurisdictions". Nothing in the history of the legislation relating to the issue of writs by the Federal courts indicates any Congressional intention to restrict the power of the Circuit Courts of Appeals to issue writs of habeas corpus under Section 262. In the absence of such Congressional intention, the high importance of the

writ, the desirability of a flexible procedure, and the public interest in the prompt disposition of criminal cases all indicate a liberal, rather than a strict, construction of Section 262.

Accordingly, it should be construed as affording a Circuit Court of Appeals the power to issue an original writ in any appropriate case within its jurisdiction, i. e. in any case in which an appeal has been taken (and also, although this case does not present the problem, in which an appeal can be taken), if special circumstances indicate the need for the use of the writ. This construction is supported by various cases in this Court and in the Circuit Courts of Appeals. No broad considerations of policy are opposed. Such a liberal construction would not involve an enlargement of the statutory jurisdiction of the Circuit Courts of Appeals; it would not, or at least need not, involve interlocutory review; and it affords what in many instances may be a highly convenient rather than an inconvenient method of disposing of a case within the court's appellate jurisdiction.

If the statute be so construed, the court below had the power to issue the writ in this case, as the facts found by it show that the issue of the writ was necessary and appropriate for the complete exercise of its jurisdiction. They show that the writ was issued because the court feared that otherwise, in view of the respondent's inability to obtain a transcript of the notes of the trial and consequent inability to prepare a bill of exceptions, the court's jurisdiction to review the conviction would be altogether frustrated, or at least seriously hampered.

III

The order below should be affirmed on the ground stated by the court below, *viz.*, this Court should hold that when on trial for a felony, the defendant, when not himself a

lawyer, may not waive a jury trial, except after consultation with an attorney retained by him or assigned to him, at least for that particular purpose. That holding does not question the broad conclusion, let alone the actual decision, reached by this Court in *Patton* v. *United States*, 281 U. S. 276 (1930), which said that a defendant in a criminal case, if adequately advised, could waive his constitutional right to a trial by jury.

The Court in the *Patton* case in effect charged the Federal trial courts with the duty of ascertaining that any waiver of a jury trial was an intelligent waiver and one proper under all the circumstances. One of the reasons for permitting the waiver in the *Patton* case was the fact that a defendant today, unlike the situation which prevailed in ancient days, has a complete opportunity to present a defense, including the right to be represented by counsel. The doctrine enunciated by the court below gives effect to the policy thus enunciated in the *Patton* case; it in effect defines an "intelligent waiver" of a jury trial as one made with the advice of, or after opportunity to consult with, counsel.

This doctrine does not deprive a defendant of the right to defend his case in person or to do it in his own way; he need not follow the advice of counsel. Nor is the fact that a defendant without counsel may plead guilty persuasive against the doctrine here contended for, for a layman is, at least in the great majority of the cases, far better able to judge whether or not he is guilty of a crime than whether his innocence may be better established before a judge than before a jury.

The case below, involving an indictment under the very broad and little-defined provisions of Section 215 of the Criminal Code, commonly called the mail fraud section, is an excellent example of a case which should have been tried by a jury with the advice of competent counsel.

Even if this Court is unwilling to go as far as the court below in holding that in all cases a defendant on trial for a felony must have an attorney retained by or assigned to him before he may waive a jury trial, the order below can still be affirmed. The Government's return to the writ, fairly read, sets forth all the facts on which the Government relies as showing that there was here an intelligent waiver of the right to counsel and of the right to a trial by jury. On the facts shown by the return, however, it appears that respondent was not advised of his right to counsel or offered an appointment of counsel by the court. Even more clearly it appears from the return that no effort was made by the trial judge to ascertain that there had been an intelligent waiver of the trial by jury or to exercise an informed discretion in approving the waiver. This Court should therefore affirm on the authority of the principles laid down in *Patton* v. *United States, supra,* and in *Johnson* v. *Zerbst,* 304 U. S. 458 (1937) and *Glasser* v. *United States,* 315 U. S. 60 (1941).

ARGUMENT

I.

THE ORDER CHALLENGED HERE SHOULD BE CONSTRUED AS AN ORDER RELEASING RESPONDENT SUBJECT ONLY TO HIS POSTING BOND TO APPEAR FOR A NEW TRIAL OR TO PROSECUTE HIS APPEAL IF THE ORDER IS REVERSED. IF, HOWEVER, THE ORDER IS CONSTRUED LITERALLY AS A BAIL ORDER, IT WAS ENTIRELY PROPER AND SHOULD NOT BE DISTURBED.

Respondent agrees with the position taken in the Government's brief (pp. 13-14) that the order here challenged should be read in the light of the opinion of the court below and in the light of the order of April 8, 1942 (Government's Brief, Appendix C), and that, read

in such light, the order should be construed as an order releasing the respondent, subject only to his posting bond to appear for a new trial or to prosecute his appeal below, if the order should be reversed.[1]

If, however, this Court feels that it must construe literally the order here challenged, its total effect is nothing but an order releasing respondent on bail conditioned to prosecute his appeal. As the court below stated (R. 9), it had ample authority to issue such an order under Rule VI of the Rules governing criminal appeals. This Court will not be solicitious to review the discretion of the Circuit Court of Appeals in determining the precise amount of bail.

Indeed, the Government's attack on the order, construed as an order reducing bail (Government's Brief, p. 14 footnote), does not really touch the propriety of the order. There is authority for the use of habeas corpus as a method of bringing about a release on or reduction of bail. *Housel and Walzer, Defending and Prosecuting Federal Criminal Cases*, §§ 102, 103 (1938). In any event the court below was at liberty, if if so desired, to treat the habeas corpus petition as an application for reduction of bail, and, if the order is construed as an order reducing bail, that is what the court below did.

The Government is really not complaining of the use of the writ of habeas corpus for this purpose. What

[1] After the filing of the opinion below and before entry of the order, the Government moved for an order staying execution of the order for a period of one week pending the filing of a petition for a writ of certiorari in this Court, urging that if McCann were forthwith released without bail, there was no assurance he would be available in the event of a retrial of the indictment or to prosecute his appeal in case the Government succeeded in reversing the order of the Circuit Court of Appeals. That motion was brought on simultaneously with the presentation for settlement of the order of release. The court below did not stay execution of the order but apparently in lieu thereof added to the order of release provisions concerning bail for the purpose of meeting the Government's objections.

the Government really objects to is the fact that in addition to entering the order, the court below, by its opinion, advised the respondent that if his appeal were pressed the court would hold that he had been deprived of his constitutional rights. This the Government speaks of as a "perversion" of the use of the writ of habeas corpus. It is difficult, however, to find any perversion of justice when an appellate court, having become familiar with the facts of a case before it on appeal, having ascertained the difficulties with which the respondent was faced in perfecting the appeal and having become convinced not only that respondent has been improperly convicted but that he had been deprived of rights under the constitution of the United States, tells him so.

The Government, far from objecting to this exercise of discretion by an appellate court, should be solicitous to see to it that constitutional rights involving personal liberty are not lost through ignorance.

The petition for certiorari sought review of the order challenged on the theory that it ordered the release of the respondent. If, properly construed, it simply effected a reduction in bail, the writ of certiorari should be dismissed as improvidently granted. Cf. *United States* v. *Rimer*, 220 U. S. 547 (1911).

II.

The Court Below Had the Power to Issue the Writ of Habeas Corpus in This Case.

(A) *The Circuit Court of Appeals acquired jurisdiction of the case by appeal and possessed the power to issue a writ of habeas corpus appropriate for the exercise of that jurisdiction.*

The jurisdictional question presented is whether the court below, having acquired jurisdiction of the case

through the filing of an appeal, had the power to issue a writ of habeas corpus which it determined was necessary for the complete exercise of that jurisdiction.

This is not a case like *Whitney* v. *Dick*, 202 U. S. 132 (1906) which held that a Circuit Court of Appeals was not authorized under the statute to issue original and independent writs of habeas corpus. In that case a defendant, convicted in a District Court, without suing out a writ of error, asked the Circuit Court of Appeals to issue either a writ of habeas corpus or a writ of certiorari. The Circuit Court of Appeals issued a writ of certiorari, and on the return ordered the petitioner discharged on the ground that the District Court had had no jurisdiction of the offense. No reason whatsoever for the use of certiorari rather than a writ of error was advanced in the petition or indicated by the Circuit Court of Appeals.

This Court reversed. Pointing out that the powers of the Circuit Courts of Appeals are only those granted by statute, and that no statutory provision expressly conferred on them the power to issue writs of habeas corpus, it held that a Circuit Court of Appeals had no power to issue a writ of habeas corpus in an independent and original proceeding, when there was no proceeding of an appellate character pending in the Circuit Court of Appeals. It thought that Section 716 of the Revised Statutes, which authorized the issue of "all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law", could not authorize the issue of a writ of habeas corpus by a Circuit Court of Appeals except in a case pending before it on appeal.

As to the power to issue a writ of certiorari, the Court apparently thought that Section 716 of the Revised Statutes conferred power on the Circuit Court of Appeals

to issue such a writ, but held that in the particular case there was no special reason why the ordinary procedure by way of writ of error should not have been followed.

Whitney v. *Dick* was obviously correctly decided on the facts there presented, in view of the absence of any showing as to the necessity for the use either of habeas corpus or of certiorari.

If it were necessary to do so, however, respondent would ask this Court to reconsider the reasoning which led the Court in *Whitney* v. *Dick* to its conclusion with respect to the use of habeas corpus.

The history of the legislation relating to the issue of writs by the Federal courts seems to show no Congressional intention to deprive the Circuit Court of Appeals of the power to issue the writ of habeas corpus in appropriate cases within their jurisdiction. Prior to the establishment of the Circuit Courts of Appeals by the Act of March 3, 1891, Chapter 517 (26 Stat. 826), the provisions relating to the issue of writs by the Federal courts were found in Revised Statutes Section 716, empowering the Supreme Court, the Circuit Courts and the District Courts to issue all writs not specifically provided for by statute necessary for the exercise of their respective jurisdictions, etc.; Revised Statutes Section 751, empowering the Supreme Court, the Circuit Courts and the District Courts to issue writs of habeas corpus; and Revised Statutes Section 752, empowering the justices and judges of said courts, within their respective jurisdictions, to grant writs of habeas corpus.

The Circuit Courts of Appeals Act made expressly applicable to the Circuit Courts of Appeals the provisions of Revised Statutes Section 716. Revised Statutes Sections 751 and 752 were not so made applicable, and the Government's brief suggests (pp. 20-22) that the failure to make Section 751 applicable indicates an intention to

limit the use of habeas corpus by the Circuit Courts of Appeals under Section 716. But there seems to be no basis for such a suggestion.

It had early been decided by this Court that the grant of the power to issue writs of habeas corpus was an express and independent grant not limited to cases otherwise within its jurisdiction. *Ex parte Bollman*, 4 Cranch 75 (1807). To have extended that section to the Circuit Courts of Appeals would accordingly have given those Courts power to deal with cases not otherwise within their appellate jurisdiction. There is, however, no reason to believe that this unwillingness of Congress (assuming it to have been more than an oversight) to confer the power found in Section 751 indicates any intention that the Circuit Courts of Appeals should not have the power to issue the writ under Section 716 (now found in Section 262 of the Judicial Code) in appropriate cases within their jurisdiction.

If there was no such Congressional intent, there was and is every reason for a liberal rather than a strict construction of Section 716 (now in substance embodied in Section 262 of the Judicial Code). The great importance of the writ of habeas corpus and the desirability of a flexible procedure in the Federal courts alone are sufficient to cause the adoption of a generous rather than a limited construction of that section.

On any reconsideration of the reasoning in *Whitney* v. *Dick*, respondent would urge that Section 716, properly construed, empowers a Circuit Court of Appeals to issue a writ of habeas corpus, on a proper showing of necessity, in any case in which an appeal has been or can be taken to that Court. Such a rule would not enlarge the jurisdiction of the Circuit Courts of Appeals; they would still exercise only an appellate jurisdiction, in cases in which jurisdiction has been conferred on them by the

Congress; but they would not be denied the power to exercise their statutory jurisdiction by whatever means, or in whatever form, might be most appropriate under all the circumstances of the case. Such a construction of Section 716 was adopted by this Court, in dealing with the right of a Circuit Court of Appeals to issue a writ of mandamus, in *McClelland* v. *Carland*, 217 U. S. 268 (1910), and indeed it was the view taken of the power of a Circuit Court of Appeals to issue a writ of certiorari in *Whitney* v. *Dick* itself. It is not apparent why the same construction should not be adopted where the writ of habeas corpus is concerned.

But respondent need not ask a reconsideration of the ground of decision in *Whitney* v. *Dick*. That decision was limited to situations in which "there was no proceeding of an appellate character pending" in the Circuit Court of Appeals, and it recognized that the issue of the writ was authorized "when necessary for and in aid of the exercise of the jurisdiction already otherwise obtained" (202 U. S. at p. 137). Here the writ was issued in a case of which the Circuit Court of Appeals already had jurisdiction, a case in which, in fact, many proceedings had already taken place before the Court of Appeals. As the opinion below noted, nothing in the *Whitney* v. *Dick* opinion is helpful in determining what this Court had in mind as the cases in which a writ of habeas corpus might be "necessary to the complete exercise of the appellate jurisdiction", and accordingly it is quite clear that nothing in *Whitney* v. *Dick* is persuasive one way or the other on the question before the Court.

And it is submitted that few, if any, of the other decisions on the jurisdictional point, collected in the Government's learned and exhaustive brief, offers this Court much help in the solution of this problem. Prior to the decision in *Whitney* v. *Dick*, there were other cases in the Circuit Courts of Appeals in which those courts had

issued original writs in cases in which, for one reason or another, there was no appellate jurisdiction in the Circuit Court of Appeals. *Ex parte Buskirk*, 72 Fed. 14, 22 (C. C. A. 4, 1896); *Ex parte Moran*, 144 Fed. 594 (C. C. A. 8, 1906). No contention is here made that those cases were correctly decided, for they involved the use of an original writ for the purpose of passing upon a case which otherwise could never have come before the court, i. e. for the purpose of enlarging, in a substantive sense, the jurisdiction of the court.

The Government's brief (pp. 15, 26-27) purports to find a conflict, in the decisions of the Circuit Courts of Appeals after *Whitney* v. *Dick*, on the question whether Section 262 of the Judicial Code authorizes the issue of original writs in cases in which a right of appeal exists but "because of the presence of 'imperatively demanding circumstances' a departure from the ordinary remedy • • • by appeal is necessary." A reading of the cases, however, shows that no real conflict exists on any such question. Cases like *Minnesota & Ontario Paper Co.* v. *Molyneaux*, 70 F. (2d) 545 (C. C. A. 8, 1934) and *Whittel* v. *Roche*, 88 F. (2d) 366 (C. C. A. 9, 1937) and the other cases cited in the Government's brief, page 27, support such a principle. But the cases cited as contra (Government's Brief, pp. 24 and 26) do not militate against the power to issue an original writ in a proper case in which appellate jurisdiction exists. Indeed, with few exceptions (e. g. *Travis County* v. *King Iron Bridge & Mfg. Company*, 92 Fed. 690 (C. C. A. 5, 1899)), the cases cited recognize that power. In several cases, however, the court disclaimed power to issue the writ because the case was one which the court had no power to review on appeal. See, e. g., *Pickwick-Greyhound Lines* v. *Shattuck*, 61 F. (2d) 485 (C. C. A. 10, 1932); *In re Eilers Music House*, 284 Fed. 815 (C. C. A. 9, 1922), cert. denied, 257 U. S. 646; *In re Paquet*, 114 Fed. 437 (C. C. A. 5, 1902); *Hammond Lumber Co.* v. *United States District*

Court, 240 Fed. 924 (C. C. A. 9, 1917) (alternative ground). In none of them had an appeal been taken, and some of them were decided on that ground in reliance on *Whitney* v. *Dick*. See, e. g., *Dooley Improvements* v. *Nields*, 72 F. (2d) 638 (C. C. A. 3, 1934); *Keaton* v. *Kennamer*, 42 F. (2d) 814 (C. C. A. 10, 1930). Cf. *Travis County* v. *King Iron Bridge & Mfg. Company*, 92 Fed. 690 (C. C. A. 5, 1899); *Hammond Lumber Co.* v. *United States District Court*, *supra*. In none of them was there any indication that in a proper case, in which an appeal had been taken, the power to issue the writ would not exist.

The Government's brief seeks to show that the cases in the Circuit Courts of Appeals which expressly assert the power to issue an original writ in cases of special need are the result of reliance upon an allegedly erroneous dictum from *In re Chetwood*, 165 U. S. 443 (1897), in which the Court referred to Section 262 (then R. S. Sec. 716) as authorizing the Federal courts to "issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law." Because the Court omitted express reference to the requirement that the writ be "necessary for the exercise of their respective jurisdictions," the Government's brief assumes that the Court overlooked it. But it is far more likely that the Court, assuming that the Federal courts would act only within their respective jurisdictions, thought that the omitted clause required no more than that, and therefore needed no mention.

The statement from *In re Chetwood* attacked by the Government because of the supposed oversight of the court in examining the statute is to the effect that, although the writ of certiorari "had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct

excesses of jurisdiction and in furtherance of justice." Whatever the merits of the Government's suggestion that the statement just quoted was made because of the Court's failure to read the entire statutory provision, that explanation cannot be made of later cases in which the same principle was laid down. The statement was quoted with approval, or the same rule stated, in *United States* v. *Dickinson*, 213 U. S. 92 (1909); *McClelland* v. *Carland*, 217 U. S. 268 (1910); *United States* v. *Beatty*, 232 U. S. 463 (1914) and *Ex parte United States*, 287 U. S. 241 (1932), in each of which the Court correctly quoted or summarized the entire statutory provision.

In two of the cases just mentioned the Court, while approving the rule announced in the *Chetwood* case, refused to issue the writ on the ground that nothing was involved but mere error.

> "But the distinction between preventing excesses of jurisdiction and the mere correction of error is a fundamental one, and the rule remains that appeal and writ of error, being the proper forms of procedure provided for the mere correction of error, the appellate jurisdiction of this court for that purpose is limited to the cases in which express provision is made for appeals or writs of error, and that certiorari cannot be independently used to supply the place of a writ of error for the mere correction of error." *United States* v. *Dickinson*, 213 U. S. 92, at page 102.
>
> *Cf. United States* v. *Beatty*, 232 U. S. 463, at pages 467-8.

These two cases thus distinguish between the use of extraordinary writs "to prevent excesses of jurisdiction" which is permissible in appropriate cases, and their use for "the mere correction of error", which is not permissible. At least analogous is the doctrine, well established in the decisions in this Court and here conceded by the Government (Government's Brief, footnote, pp. 16-17)

that habeas corpus is a proper remedy if the court had no jurisdiction to try the petitioner or if fundamental constitutional rights had been denied him. *Bowen* v. *Johnston*, 306 U. S. 19, 24 (1939) Cf. *Riggins* v. *United States*, 199 U. S. 547 (1905) where the Court disapproved of the use of habeas corpus for the mere correction of error; accord, *United States* v. *Valante*, 264 U. S. 563 (1924).

The real point for decision here is the meaning which ought to be attached to the phrase in Section 262 empowering the courts to issue writs "necessary for the exercise of their respective jurisdictions." Ordinarily a grant of power to do what is necessary for a given purpose is a grant of power of what is reasonably calculated to bring about that purpose. "To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end * * *" *McCulloch* v. *Maryland*, 4 Wheaton, 316, 413 (1819). No reason is apparent here why this phrase in Section 262 of the Judicial Code should not be construed in a like spirit in the interests of the flexible, prompt and efficient functioning of the Federal courts and particularly in the public interest in the prompt disposition of criminal cases. See *Ex parte United States*, 287 U. S. 241, at 249; *Ex parte Siebold*, 100 U. S. 371, 375 (1879).

The Government's main argument, implicit rather than stated, seems to be that an extraordinary writ cannot be issued under Section 262 in a case within the appellate jurisdiction unless, as a result of the issue of the writ, the case will be disposed of by an affirmance or a reversal. This is apparently what is meant by the contention advanced by the Government in various places that an original writ cannot be used as a substitute for an appeal. It is also what is meant by the Government's insistence that the writs can be used only as an auxiliary to the jurisdiction to review *by appeal*. Under this construction the writ was unauthorized in the present case, because it

in effect disposed of the appeal and rendered unnecessary an affirmance or a reversal.

Such a construction is, of course, entirely inconsistent with the *Chetwood*, *McClelland* and *Beatty* and other similar cases of this Court referred to above. A contrary construction is supported by the more recent cases in the Circuit Courts of Appeals. *Whittel* v. *Roche*, 88 F. (2d) 366 (C. C. A. 9, 1937); *Greyerbiehl* v. *Hughes Electric Co.*, 294 Fed. 802 (C. C. A. 8, 1923); *Grable* v. *Killits*, 282 Fed. 185 (C. C. A. 6, 1922), cert. denied 260 U. S. 735; *United States* v. *Malmin*, 272 Fed. 785 (C. C. A. 3, 1921).

In *Whittel* v. *Roche*, the court expressly rejected the view that issuance of the writ was within its power only when the case was thereby brought before it on appeal and issued a writ of mandamus to compel the District Court to grant plaintiff's motion to dismiss his suit. Similarly in the *Greyerbiehl* case, the court issued a writ of certiorari to review a decision of the District Court after the time for filing a writ of error had expired, while in the *Grable* case the court issued a writ of mandamus in aid of a general appellate jurisdiction not actually evoked by appeal, the court stating:

> "* * * Petitioners should not be required to await the slow process of an appeal from such invalid order, whose operation meanwhile involves an encroachment upon their rights" (p. 196).

Indeed, in *United States* v. *Malmin*, the Circuit Court of Appeals issued a writ of mandamus requiring a District Judge in the Virgin Islands to resume his office and duties, and justified the issuance of this writ as an exercise of its appellate jurisdiction, although not only was an appeal not pending before the court but the writ was issued without reference to any case from which an appeal might have been taken.

Nothing in the language of Section 262 compels acceptance of the construction urged by the Government.

The phrase "necessary for the exercise of their respective jurisdictions" can easily be construed as intended only to prevent the courts from acting in cases not within their respective jurisdictions. Without such a limiting clause, a grant of the power to issue original writs would have permitted the courts to deal with cases which could otherwise never have come before them and thus would have involved substantial enlargement of their jurisdictions.

This is not to say that a Circuit Court of Appeals would or should issue the writ merely because it has the power to do so. There remains the factor of the court's discretion which has been accorded all too narrow a place in the Government's brief. Writs of habeas corpus, certiorari, mandamus and prohibition are extraordinary writs and "This court has never decided that [they are] to be resorted to in place of a writ of error whenever it suited the convenience of parties. There must be 'circumstances imperatively demanding' a departure from the ordinary remedy by writ or error or appeal". *Whitney* v. *Dick*, 202 U. S. 132, at 140.[2] Cf. *Minnesota & Ontario Paper Company* v. *Molyneaux*, 70 F. (2d) 545 (C. C. A. 8, 1934).

Certainly no broad considerations of policy militate against the construction here urged. The "familiar policies which deny review at interlocutory stages" (Government's Brief, p. 8) certainly have no application in the present case where the effect of the issue of the writ was to dispose of a case which had already, for that matter, been finally decided below. If it be urged that the

[2] That this statement was addressed to the habeas corpus proceeding as well as to certiorari, contrary to the suggestion made in footnote 25 on page 27 of the Government's brief, and that it refers to a court's discretion rather than its jurisdiction is shown by the next paragraph of the Court's opinion in which it compared certiorari with habeas corpus and stated that "the latest expression of the views of this court is to be found in *Riggins* v. *United States*, 199 U. S. 547"—a case in which this Court held that the Circuit Court improperly issued a writ of habeas corpus.

power to issue original writs could be used in other cases as a device for review at interlocutory stages, the answer is, first, that the statute need not be construed to permit the issue of original writs unless, under all the circumstances—including the operation of any policy against interlocutory review—it is appropriate, and second, that even if the statute be construed to give full power to the Circuit Court of Appeals, in its discretion, to issue these writs, there is no reason for any assumption that the Circuit Court of Appeals will abuse their discretion. If they do, the discretion is subject to the control of this Court.

Nor is it evident that the power to issue original writs under the circumstances here present would be "highly inconvenient" (Government's Brief, p. 8). The court below did not find it so; on the contrary it found it highly convenient. Nor is it clear why the facilities of the Circuit Courts of Appeals for hearing cases involving disputed facts outside of the record are any less satisfactory than those of the District Court, or why such facilities of the Circuit Court of Appeals sitting *in banc* are less satisfactory than those of a circuit judge sitting alone. Yet any of the circuit judges, sitting alone, could have issued the writ. Section 452 of Title 28, U. S. C.

Since the court below, by the use of the writ, did no more than dispose of a case within its appellate jurisdiction, and particularly as admittedly any one of the circuit judges could have taken the action which the court below took, it is a little difficult to understand the Government's strong position on the jurisdictional question. It smacks of a formalism long since outmoded. The respondent and the Government have had a determination of an issue which is decisive of the case; if the court below is right on the merits, substantial justice has been done. Centuries ago such questions of form were all important; whether an action sounded in trespass or in trespass on the case determined many an important litigation regardless of the merits; but happily those days are done.

(B) *The writ of habeas corpus was necessary and appropriate for the complete exercise of the jurisdiction of the Circuit Court of Appeals in this case.*

The court below, familiar with the opinion in *Whitney v. Dick*, issued the writ of habeas corpus only after an express finding that the writ was necessary to the complete exercise of the court's appellate jurisdiction. The court so found:

> "because for the reasons we have given there is a danger that it [the court's appellate jurisdiction] cannot be otherwise exercised at all and a certainty that it must in any event be a good deal hampered" (R. 9).

The court, from the various proceedings theretofore had before it in connection with the various motions of the respondent mentioned above (*supra*, pp. 2, 3) knew that the respondent on his appeal would rely not only upon the denial of constitutional rights challenged by the writ of habeas corpus, but upon other alleged serious errors, including a claim that the conviction was not supported by the testimony. The court knew, also, that a complete transcript or digest of the testimony and proceedings at the trial was necessary if the respondent was to prepare a satisfactory bill of exceptions. The court pointed out (R. 8) that the minutes had never been typed, that respondent had no money and that until recently had had no lawyer to represent him, and accordingly that "it is at least doubtful whether any [bill of exceptions] can ever be made up on which the appeal can be heard".

The court knew also that the minutes of the testimony and proceedings were in the hands of a private reporter who required the payment of $1,200 before the minutes could be typed and that respondent was unable to procure access to these minutes; for on January 5, 1942, it had entered an order denying respondent's motion to compel

the Government to give him access to the minutes at its expense but granting, as alternative relief, the right to respondent to prepare the best bill of exceptions which he could prepare in the circumstances. A copy of that order has been filed with the Clerk of this Court, and is printed as Appendix B to this brief.

The court, accordingly, concluded that it was at least doubtful whether the appeal ever could be heard (R. 8). It is true that the court did say that a bill of exceptions *might* be prepared which would be confined to the single point raised by the writ (R. 9). The Government, turning this into a statement that a bill of exceptions *could* be prepared if confined to that point, urges that no case for the use of an extraordinary writ has been made out. The Circuit Court of Appeals, however, quite properly felt that justice would not require the respondent, by attempting to prepare a bill of exceptions confined to the one question, to waive all other errors committed at the trial.

Respondent respectfully submits that the considered finding of the Circuit Court of Appeals should not be lightly set aside.

III.

THE ORDER OF THE COURT BELOW DISCHARGING RESPONDENT MUST BE AFFIRMED, SINCE THE RECORD ESTABLISHES THAT RESPONDENT'S CONSTITUTIONAL RIGHTS TO A TRIAL BY JURY AND ASSISTANCE OF COUNSEL WERE DENIED.

Respondent submits that this order should be affirmed on the ground set forth by the court below, namely, that, as a matter of law, a defendant on trial for a felony should not be permitted to waive trial by jury without the advice of counsel, at least as to that particular point.

But even if this Court should reject that salutary rule, respondent submits that the order must be affirmed be-

cause the record discloses a violation of respondent's constitutional rights to trial by jury and assistance of counsel by the trial court: that respondent could not have intelligently waived his right to assistance of counsel and trial by jury because he was not fully apprised of either right; and that by reason thereof the trial court lost its jurisdiction, a fact which this Court may notice, and on the basis of which it should affirm the order on the authority of *Patton* v. *United States*, 281 U. S. 276 (1930) and *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

A. *The importance of respondent's right to trial by jury was such that its adequate protection required the advice of counsel as a condition precedent to an intelligent waiver of that right.*

The right of an accused, accorded by the Sixth Amendment to the Constitution of the United States, to "enjoy the right * * * to have the assistance of counsel for his defense" has been too recently before this Court for us to do more than indicate its vital importance. As this Court has said in *Johnson* v. *Zerbst, supra*, at page 462:

> "The Sixth Admendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to '* * * the humane policy of the modern criminal law * * *' which now provides that a defendant '* * * if he be poor, * * * may have counsel furnished him by the state * * * not infrequently * * * more able than the attorney for the state.'"

Similarly, the importance of an accused's right to a "speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed", accorded by the same amendment, is too well known and understood to require extended discussion. In summary, we can do no better than quote the reasons assigned by the court below for the importance of this right:

> "* * * The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly, or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury, however small, preserves both these fundamental elements and a trial by a judge preserves neither at least to anything like the same degree" (R. 10, 11).

Despite the importance of these rights, this Court has indicated, and for the purpose of this case we may concede, that either right may be waived, although it does not necessarily follow that both rights may be concurrently waived.

> *Patton* v. *United States, supra;*
> *Johnson* v. *Zerbst, supra.*

Although the *Patton* case decided only that the accused might lawfully consent to a jury of less than twelve (eleven), this Court was plainly concerned to protect even that small measure of surrender, as appears from the language with which it hedged the accused's power:

> "In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury

and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. * * * Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

Patton v. *United States, supra*, at 312-313.

The court below did not question the broad conclusion reached by this Court in the *Patton* case, nor do we suggest its reexamination at this time. What the court below did was to give effect to the admonition of this Court in the *Patton* case that the intelligent consent of the defendant must be secured for any waiver of a jury trial, and that the duty of the trial court in that regard must be discharged with a careful discretion increasing as the gravity of the offense increases. The court below felt that it was wise and proper to insist, before any finding of an intelligent waiver of a jury trial can be made, that the defendant have the advice of counsel at least on that point. This doctrine is not only wholly consistent with the reasoning in the *Patton* case; it is suggested by the fact

that the *Patton* decision advanced as an important reason for permitting waiver of a trial by jury the fact that the defendant "now charged with crime is furnished the most complete opportunity for making his defense. * * * [including the right]; if he be poor, [to] have counsel furnished him by the state * * *" *Patton* v. *United States*, 281 U. S. 276, at 308.

This Court in the *Patton* case thus indicated that it meant a defendant's consent to trial without jury to be jealously scrutinized even where, as there, defendant had counsel who concurred in the waiver. If such safeguards are to be thrown about a defendant attended by counsel, why should not this Court "treat it as a critical circumstance" that a defendant be given the protection of the advice of counsel where waiver of a jury trial is in question, even though the advice is confined to that one question. An effective way to safeguard the constitutional right to trial by jury is to throw about it the protection of another constitutional right—the assistance of counsel. Such a doctrine would lessen rather than increase the burden of the trial court, and would tend to provide a defendant with helpful advice of a character which the trial court might not be able to give.

The Government's brief to the contrary notwithstanding (pp. 42-43), the doctrine announced by the court below does not deprive a defendant who desires to represent himself of the right to waive a trial by jury. He may still waive that right although counsel whom he consults may advise against it. The doctrine would seem to require no more than that the court appoint counsel for a defendant who, in a serious felony case, desires to waive trial by jury, and thus at least subject the defendant to a presumably wiser influence. Compare the procedure followed in *Zahn* v. *Hudspeth*, 102 F. (2d) 759 (C. C. A. 10, 1939) in which, although the defendant refused the trial court's offer to appoint counsel, the trial court nevertheless appointed an attorney to sit with the defendant and

to be available for advice in case the defendant should be willing to take it.

The Government's solicitude for the right of a defendant to manage his own cause personally, and its objection that the rule adopted below violates that right, as conferred by Section 272 of the Judicial Code, is no less surprising. Applying as it does, the *laissez faire* doctrine of classical economics to the constitutional protection of political rights and human liberties, this argument is more than faintly reminiscent of an advocacy which, at one time, upheld the right of every human being to work for less than a living wage. In any event, the argument based on the right of parties to manage their own causes personally proves too much. The right of a defendant represented by counsel to waive a jury trial is, under the doctrine of *Patton* v. *United States*, no more absolute than that of a defendant without counsel. Even when the defendant has counsel, it is clear that the United States Attorney may prevent the waiver, and, moreover, the *Patton* case makes it clear that the trial judge has and should exercise, in a proper case, the power to refuse to approve the waiver.

The Government's argument based on the power of defendant to plead guilty whether with or without counsel is hardly persuasive. As this court has often pointed out, a layman is ordinarily simply not competent to understand the problems which he faces on the trial of a case, and, at least in many cases not knowing what the real issues may be, a layman certainly is not competent to appraise his relative chances before a jury and a judge. On the other hand, certainly in the ordinary case the defendant knows whether or not he is guilty of the crime charged. It is true that there could be cases in which a defendant's guilt does not depend upon facts within his own knowledge but upon the legal effect of such facts or the construction of a statute; but it is hardly an argument against the rule adopted by the court below that its merit may be such as

to require its extension to analogous situations. There is certainly a great deal to be said against accepting a plea of guilty without legal advice in any case in which a layman would not ordinarily know whether or not he is guilty.

The reasons for the importance of trial by jury, referred to in the opinion of the court below, are well illustrated in the present case, as is the importance of counsel in making a decision on the question of a waiver of that right. The Government's brief (p. 46) points out that there is nothing in the record to indicate "that the absence of counsel and of jury resulted in any injustice or, indeed, any mistake in strategy which might have been avoided had there been a jury", and the brief goes on to point out that respondent has not suggested that the result would have been different had he been tried by a jury or been advised by counsel. But certainly the question of respondent's innocence or guilt is aside from the question here under consideration, nor can the question of the existence of constitutional rights be decided by an examination in each case into the question of whether a different result would have obtained if the constitutional rights had not been denied.

Although the question of innocence or guilt is not open here, it is perhaps important to refer to the statute under which the respondent was indicted and convicted. The important parts of the statute—which is set forth in full in Appendix A to this brief—provide that:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any * * * writing, * * * in any * * * letter box of the United States, * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both." (Crim. Code, § 215; 18 U. S. C., § 338.)

The sweeping breadth of the statute is at once apparent to a legally trained mind. An examination of the authorities shows no restriction by judicial construction. Numerous decisions establish the fact that all that is necessary to convict under this statute is proof that the defendant devised a scheme with intent to defraud, and that thereafter he used the mails in executing or attempting to execute the scheme: *Durland* v. *United States*, 161 U. S. 306, 315 (1896). To uphold an indictment or to sustain a conviction, it is not necessary to show that the defendant intended to use the mails at the time the scheme was devised, *Brewer* v. *United States*, 290 Fed. 807, 808 (C. C. A. 2, 1923), cert. den. 263 U. S. 707; *United States* v. *Young*, 232 U. S. 155 (1914); that any one was, in fact, defrauded, *Durland* v. *United States*, *supra*; or that the defendant received any benefit whatsoever. *Calnay* v. *United States*, 1 F. (2d) 926 (C. C. A. 9, 1924).

In view of the fact that a sufficient indictment may thus allege apparently innocuous acts, with the single exception of a general allegation that an intent to defraud existed at the time of such acts, it is little wonder that the reaction of the innocent layman to such an indictment is that such acts cannot be a crime, and that the only question involved is one of law, as is perhaps evidenced in this case by the number of motions which were addressed to the sufficiency of the indictment (R. 4, 5).

A competent lawyer, however, would have accepted the situation revealed by his examination of the statute and of the judicial authorities construing it. He would have seen that the sweep in this statute was so broad that the result, while perhaps necessary to combat the ingenuity of individuals whom Congress sought to reach, was to foreclose to a defendant indicted thereunder practically any defense in law. He would probably have advised respondent, first, that as the acts charged were of themselves innocuous, and the whole question of guilt turned on intention, a jury, charged not to find guilt if a reasonable doubt

exists, would be less likely to convict than a judge; and, second, that this would be particularly true where the trial judge is a judge from another and distant section of the country, presumably unfamiliar and perhaps unsympathetic with the business customs and practices of the district where the offenses were charged to have taken place and the trial held. Here the indictment involved transactions in securities, at least most of which took place in the Southern District of New York; the judge was from Missouri (R. 2).

The rule adopted by the court below, on the facts in this case, should be affirmed by this Court. It does not follow, as the Government would have us believe, that, because a defendant may waive, under appropriate circumstances, either the right to a trial by jury or the right to assistance of counsel, the surrender of the two rights in the same case cannot constitute the loss of a greater right than either individually confers.

B. *The record here shows no intelligent waiver of the right to counsel or of the right to a trial by jury, and this Court should affirm on that ground.*

Unquestionably the court below decided the case on a straight question of law reduced to "the barest possible form: * * * Limiting ourselves therefore to the exact situation before us, we hold that when on trial for a felony, the accused—at least when not himself a lawyer—may not consent to be tried by a judge except upon the advice of an attorney, retained by him or assigned to him, even though that advice extends to no more than that particular choice" (R. 10, 11).

Nevertheless, we venture to suggest to this Court that, even if it be unwilling to go as far as to sustain in the abstract the holding below, the order below may still be affirmed. We suggest that on the record—on the undisputed facts set forth by the Government in the return

to the writ—it appears that there was not an intelligent waiver of the right to counsel and of the right to a trial by jury, and that therefore, under settled decisions of this Court, the order below should be affirmed. Respondent is free to sustain the order below on any legal ground which will support it. *Ryerson* v. *United States*, 312 U. S. 405, 408 (1941).

As pointed out *supra*, pages 3, 4, the original petition for habeas corpus contained detailed allegations showing that respondent was not aware of his right to counsel or of the significance of his right to a trial by jury. Those allegations would clearly have raised the validity of the waiver of the right to counsel and of the right to a trial by jury under the decisions of this Court in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938) and *Patton* v. *United States*, 281 U. S. 276, 312 (1930). That petition was withdrawn at the court's suggestion, and the substituted petition, it is true, did not contain the same allegations. It simply stated that respondent was a layman, that at no time had he had the aid of counsel, and that a trial by jury had been waived by him in the following manner as shown by the court clerk's minutes (R. 2):

> "'July 7th, 1941: Room 318:
>
> Mathias F. Correa, U. S. Attorney by Richard J. Burke.
>
> Gene McCann, Pro se.
>
> Honorable Merrill E. Otis, District Court Judge, Presiding.
>
> Defendant moves to waive trial by jury and the Court to decide issues of fact. Motion granted on consent of U. S. Attorney.'"

Finally the substituted petition alleged denial of his constitutional rights in general terms (Petition, paragraphs Fourth and Fifth, R. 3).

The return, denying none of the allegations of the substituted petition except the general allegations contained

in paragraphs Fourth and Fifth, set forth the facts, and apparently all the facts, on which the Government relies to show that the respondent intelligently and legally waived his constitutional rights.

The substituted petition was probably sufficient to raise the question of denial of respondent's rights to counsel and to a jury trial, as well as the validity of any waiver thereof. As this Court has said "A petition for habeas corpus ought not to be scrutinized with technical nicety". *Holiday* v. *Johnston*, 313 U. S. 342, 350 (1941). In any case, the Government in its return has treated the petition as sufficiently raising such issues, and has supplied facts, admitted for purposes of this proceeding, sufficient to enable those issues to be determined. We think the return fairly shows on its face that it was intended by the Government to be as strong a statement of the facts as could be made in favor of the validity of the waiver of the constitutional rights here involved. It was presumably prepared by, and in any event was supported by an affidavit of, the Assistant United States Attorney who tried the case in the District Court (R. 7).

On the facts set forth in the return, it is evident that the trial court neither fully advised respondent of his right to counsel, nor undertook in any real sense to pass on the important question whether to accept the waiver of a jury trial, nor attempted in any way to appraise respondent of the significance of that waiver.

First, as to the state of the record with respect to the waiver of right to counsel. It is not disputed that respondent was without funds and unable to obtain counsel to defend himself. Of this, of course, the trial judge had no knowledge as far as appears from the record. Although the question of counsel was twice mentioned—once at the arraignment and once when the case was called for trial (R. 4-5, Return, paragraphs 6, 8), the court did not inquire of respondent why he was not repre-

sented by counsel, it did not advise him of his right to counsel and did not tell him that the court would assign counsel if he were without funds for the purpose. Nowhere in the record is it suggested that respondent was aware of such rights. All the record does show is that the trial court recommended that respondent retain counsel, and that respondent, stating his desire to represent himself, did not assign poverty as a reason.

To bolster its position the Government (R. 5-6, Return, Par. 12) mentions previous civil litigation in which respondent had represented himself. It "refers to this testimony to show petitioner's intelligence, experience and familiarity with courts and legal proceedings as bearing upon the legality of his waiver of the rights to representation by counsel and of trial by jury." Respondent's previous experience in civil litigation, however, certainly did not tend to teach him that he was entitled as of right to the appointment of counsel in criminal litigation if he was without funds. It is understandable that he should be of the opinion that he was better able to defend himself than would any attorney that he might procure (R. 4-5, Return, pars. 6, 8), in view of his impoverished condition. All this could have been elicited with little effort by the trial court, but was not.

Nothing in the record, therefore, shows an intentional waiver of a known right to the appointment of counsel. It is true that paragraph 3 of the return does state in general terms that respondent knowingly waived his right to the advice and assistance of counsel with full knowledge of the significance of such act (R. 4). That general allegation, however, should be read in the light of, and regarded only as a conclusion based upon, the detailed allegations with respect to the waiver of counsel set forth in paragraphs 4 to 8 and 10 to 12 of the return.

The record furnishes even less ground for believing that there was any intelligent waiver of a trial by jury.

The petition shows the bare fact of the waiver, as shown by the minutes of the clerk of the court (R. 2, *supra*, p. 33). The return supplements the minutes, showing what actually happened:

> "Upon information and belief, petitioner then moved to have the case tried without a jury by the judge alone. There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney, at which it was determined that a form of waiver of petitioner's constitutional right to a jury trial should be prepared by the Assistant United States Attorney. Such a waiver was prepared and a copy thereof is hereto annexed and marked 'Exhibit A.' It was executed in writing by the petitioner and approved by the Assistant United States Attorney and by the Court" (R. 5—Return, Par. 9).

In this perfunctory fashion respondent was permitted to make the most important decision which confronted him on the trial. Respondent's proposal to waive a jury brought forth not an attitude of solicitude on the part of the trial judge, but a "brief discussion," the only purpose of which, as far as the return shows, was to make sure that the waiver was put in proper form by the Assistant United States Attorney and duly signed by the respondent. This record affirmatively shows that the trial court did not take cognizance of the important duty with which it was charged by the decisions of this Court in *Patton* v. *United States*, *supra*, and *Glasser* v. *United States*, 315 U. S. 60, 71 (1942). As the Glasser opinion stated, "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."

Surely something more than this was what the Court had in mind when, in *Patton* v. *United States*, it took the grave step of sanctioning the waiver of a jury trial with a mandate to the trial courts to exercise a sound and advised discretion in determining whether to permit the waiver.

It is hardly necessary to point out that the trial court's neglect in this respect was aggravated by its previous failure to ascertain the true situation with respect to respondents lack of counsel and to apprise him fully of his right to have counsel appointed to defend him. The measure of the trial judges' duty was first defined by this Court in a case in which the defendant was represented by counsel of his own choice who concurred in the waiver. How much greater that measure should be where defendant is without counsel was indicated by the Court of Appeals for the Fifth Circuit in *Dillingham* v. *United States*, 76 F. (2d) 36 (1935), in which the Court said at page 39 of its opinion:

> "When, as here, defendant brings up a record which shows that he has not had the trial by jury which the Constitution guarantees, if waiver is relied on for affirmance, particularly if the waiver has been given without advice of counsel of his own selection, the record must clearly show that the waiver was formally and legally obtained upon a full explanation and understanding of his rights".

This Court has stated in *Glasser* v. *United States*:

> "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights" (p. 70).

Surely, on the record here made by the Government's return, it can be said that the waiver was not formally and legally obtained upon a full explanation and understanding of respondent's rights, and that the trial court did not discharge its duty in that respect with a "sound and advised discretion".

CONCLUSION

It is respectfully submitted that the order of the Court below should be affirmed.

ROBERT G. PAGE,
Attorney for Respondent.

EDWARD D. WYNOT,
of Counsel.

Appendix A

The Sixth Amendment to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 262 of the Judicial Code (28 U. S. C. §377) provides:

"The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

28 U. S. C. §§ 451, 452 and 463 (a), relating to the power of courts to issue writs of habeas corpus, provide:

Sec. 451. "The Supreme Court and the district courts shall have power to issue writs of habeas corpus."

Sec. 452. "The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

Appendix A.

Sec. 463. (a) "In a proceeding in habeas corpus in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had: *Provided, however,* That there shall be no right of appeal from such order in any habeas corpus proceeding to test the validity of a warrant of removal issued pursuant to the provisions of section 591 of Title 18 or the detention pending removal proceedings. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

Section 215 of the Criminal Code (18 U. S. C., Section 338) provides as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose

of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

Appendix B

AT A STATED TERM OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, HELD AT THE UNITED STATES COURT HOUSE, FOLEY SQUARE, CITY, COUNTY, AND STATE OF NEW YORK, ON THE 5TH DAY OF JANUARY 1942.

PRESENT: HON. LEARNED HAND,
HON. HARRIE B. CHASE,
HON. CHARLES E. CLARK.

UNITED STATES OF AMERICA, Plaintiff-Appellee, *against* GENE MCCANN, Defendant-Appellant.	ORDER.

Upon the defendant-appellant's notice of motion, dated December 17th 1941, and his "Notice", dated December 2nd 1941, both subjoined to said notice of motion, for an Order granting him the following main and/or alternative relief:

1. Waiving and setting aside, in the case at bar, this Court's requirements under its General Rules 9, 10 and 13 (Sub-division 2) and permitting the defendant-appellant to prosecute his appeal herein, as follows:

Appendix B

A. Upon a bill of exceptions, record on appeal and an assignment of errors consisting of a resume, in narrative form, of the testimony given, rulings of the Trial Judge, stipulations and concessions made and of the other proceedings had on the trial in the Court below; and

B. upon an assignment of errors, as "to the admission or to the rejection of evidence" or other assigned errors, in narrative form, instead of question and answer or other form, and without quoting verbatim "the full substance of the evidence admitted or rejected", etc; and

C. upon a bill of exceptions and record on appeal containing no findings nor opinions of the Trial Judge, nor of any other proceedings had in this cause not presently found in the Clerk's Trial Minutes or in the files or docket of the Clerk of the Court below or otherwise available to the defendant-appellant; and

D. all pursuant to General Rule 22 of this Court, to the poverty and custody of the defendant-appellant—which makes it impossible for him to pay the some $1,200.00 demanded by the "Southern District Court Reporters", a private agency, for the minutes of the trial in the Court below, and to the provisions of Section 832, Title 28, U. S. Code;

or as alternative relief,

2. Directing that the defendant-appellant be given, for the purpose of copying and perfecting his assignment of errors, bill of exceptions and record on appeal, access to the stenographer's minutes of the trial and proceedings had in this cause in the Court below, at Government expense or otherwise, pursuant to Section 832, Title 28, U. S. Code; and

3. Extending the Term of this Court and of the United States District Court for the Southern District of New York and the time within which the defendant-appellant can perfect, settle and file his bill of exceptions and record on appeal herein in this and the said Court below, to serve and file therein an amended assignment of errors, and for all other purposes, up to and including April 9th 1942; and

4. Granting to the defendant-appellant such other and further relief as to the Court may seem proper and just.

and the said motion having duly come on to be heard before this Court on January 5th 1942,

Now, after hearing Gene McCann, the defendant-appellant pro se, in support of said motion and Richard J. Burke, Assistant United States Attorney for the Southern District of New York, attorney for the United States of America, who consented to the granting of the main relief sought on said motion and opposed only the alternative relief, Numbered 2, sought thereon, it hereby is

ORDERED, that the aforesaid main relief, Numbered 1 and sub-divisions A, B, C and D thereof, sought on the said motion be and the same hereby is, in all respects granted, and it is further

ORDERED, that the aforesaid alternative relief, Numbered 2, sought on the said motion be and the same is, in all respects, denied, and it is further

Appendix B

ORDERED, that the aforesaid alternative relief, Numbered 3, sought on the said motion be and the same hereby is, in all respects, granted.

L. HAND
UNITED STATES CIRCUIT COURT JUDGE

HARRIE B. CHASE
UNITED STATES CIRCUIT COURT JUDGE

CHARLES E. CLARK
UNITED STATES CIRCUIT COURT JUDGE

Approved as to form:
Mathias F. Correa
United States Attorney,
by Richard J. Burke
Asst. U. S. Atty., of Counsel

A true copy,

D. E. Roberts
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 79

WILLIAM A. ADAMS, Warden of the City Prison of Manhattan, and JAMES E. MULCAHY, United States Marshal,
Petitioners,

v.

THE UNITED STATES OF AMERICA, *ex rel.*
GENE McCANN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

ROBERT G. PAGE,
Attorney for Respondent.

EDWARD D. WYNOT,
Of Counsel.

JEFFREY PRESS, INC.

IN THE

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THE UNITED STATES OF AMERICA, *ex rel.*
GENE McCANN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

The respondent herein prays for a rehearing and a reargument in this case, and for a stay of mandate until such rehearing and reargument have been had. The opinion of this Court was rendered and judgment entered on December 21, 1942.

The sole question involved is whether the trial judge complied with the safeguards prescribed by this Court in *Johnson v. Zerbst*, 304 U. S. 458 (1938), and *Patton v. United States*, 281 U. S. 276, 312 (1930), in sanctioning respondent's trial and conviction without the assistance of

counsel and a trial by jury. The record in this Court and in the court below presents only the Government's version of the facts relating to this question because, for the reasons which appear below, respondent did not file a traverse to the Government's return.

In order that *both* parties may be heard on the *merits* of that question, respondent will, and in this petition does, respectfully request that the opinion herein be modified and the case remanded for such further proceedings as are not inconsistent with the opinion of this Court and as the Circuit Court of Appeals for the Second Circuit may, in its discretion, deem proper to determine the question stated above. Unless this relief is granted, respondent may never be heard on the merits of the questions raised in the Government's return.

As the grounds for this petition, the respondent respectfully urges:

1. The opinion of this Court may be taken as a final and conclusive adjudication of all questions raised in the Government's return to the writ of habeas corpus, notwithstanding the fact that the record before this Court does not show whether respondent in fact knew or was advised of, and could therefore have intelligently waived, his constitutional rights to assistance of counsel and to a trial by jury, because those questions were eliminated from the proceedings below at the suggestion of the court below.

The opinion of this Court states:

> "We accept as facts, as did the court below, those set forth in the untraversed return to the writ of *habeas corpus* in that court. (87 L. ed. 209.)
>
> * * * * *
>
> "And if the record before us does not show an intelligent and competent waiver of the right to the

> assistance of counsel [*sic*] by a defendant who demanded again and again that the judge try him, and who in his persistence of such a choice knew what he was about, it would be difficult to conceive of a set of circumstances in which there was such a free choice by a self-determining individual.
>
> "The order of the court below must therefore be set aside.
>
> "*So Ordered.*" (87, L. ed. 215.)

Neither the opinion in this Court nor the opinion in the court below indicates that the respondent was induced to strip the record of pleadings traversing the return in order to conform to the suggestion of the court below that all controversial questions of fact should be eliminated so that, as the court later stated:

> "This point is therefore presented to us in the barest possible form: Has an accused, who is without counsel, the power at his own instance to surrender his right of trial by jury when indicted for felony?" (R. 10).

This omission, together with the portions of the opinion quoted above, may give rise to an implication that respondent did not traverse the facts stated in the substituted return for the sole reason that he was forced to concede that such facts were true, and that respondent therefore has had a full, final and conclusive adjudication of all matters raised in the return.

In fact, however, respondent upon several occasions denied the allegations of the return and, far from conceding the truth of the allegations in the Government's substituted return, appears to have considered his failure to traverse them merely as in the nature of a demurrer to the return.

It is true that this is not apparent from the record, but the fact that a writ of habeas corpus was issued (March

12, 1942; R. 1) eight days before the petition for the writ was filed (March 20, 1942; R. 2) suggests that other pleadings not revealed in the record must have preceded this petition, and no secret has been made of the fact that such pleadings existed; indeed, the original petition, dated March 12, 1942, was printed by the Government as Appendix D to its brief. Counsel for respondent and for the Government are in general agreement as to the nature and the course of such pleadings (Respondent's Brief, pp. 3-4, 33; Government's Brief, pp. 3-6, 35-36). As stated in the Government's brief (p. 35):

> "The course of the pleadings in the court below shows the purpose to eliminate all factual questions and to present this question, as the court below said, 'in the barest possible form' (R. 10)."

Respondent has filed with the Clerk of this Court an affidavit of Frank J. Walsh, his attorney in the court below (annexed hereto as Exhibit A), annexed to which as exhibits (annexed hereto as Exhibits B-D) are such of the pleadings as have not been previously printed as appendices to the briefs herein.

From this affidavit and the exhibits attached thereto, it appears that the pleadings set forth in the record were substituted for the following earlier pleadings, all of which preceded the substituted petition:

(1) Original petition, dated March 12, 1942 (Government's Brief, Appendix D).

(2) Government's original return, dated March 16, 1942 (Exhibit B hereto).

(3) Respondent's reply affidavit, dated March 18, 1942, traversing the original return (Exhibit C hereto).

Respondent's original petition and his affidavit traversing the return contained allegations to the effect that at no

time was the respondent advised by the trial judge, the United States attorney, nor by anyone else of his right to the assistance of counsel; that the trial judge did not offer to assign counsel to assist respondent; that respondent was ignorant of his right to counsel, and represented himself because he could not pay the charges of competent counsel; that in waiving a jury trial respondent acted without the advice of counsel, and without knowledge of his rights and of the significance thereof; and that the waiver was sanctioned by the trial judge as a matter of rote, without knowing the facts and without exercising any discretion.

It is clear that these allegations sufficiently traversed the facts stated in the return, and would have raised the question of whether respondent had been deprived of his constitutional rights to counsel and to a trial by jury under the decisions of this Court in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and *Patton* v. *United States*, 281 U. S. 276, 312 (1930). That question was never presented to the court below in this form, nor decided by that court, for the reason that when the original petition, return, and traverse were handed up to the court on the return date, March 18, 1942, the court stated, according to the affidavit of respondent's counsel in the court below, that controversial questions of fact unnecessary to the decision of the case had been injected, and suggested that the pleadings be withdrawn and an amended petition filed which would present the question in the barest possible form. (Exhibit A hereto, pars. 8, 9, pp. 13-14).

In accordance with this suggestion, respondent withdrew his original petition and traverse and filed the substituted petition appearing at pages 2-3 of the record, but to this the Government filed a substituted return which was substantially identical with that filed to the original petition (cf. R. 4-7; Exhibit B hereto, pp. 16-22).

Minor discrepancies between the Government's original

and substituted returns need not be detailed, but two interesting variances may be noted. Paragraph 3 of the original return, reading as follows:

> "Upon information and belief, the petitioner was at all times aware of his constitutional rights to the advice and assistance of counsel and to a jury trial and did knowingly waive both rights with full knowledge of the significance of such acts" (Exhibit B hereto, p. 17)

was replaced by the following paragraph 3 in the substituted return:

> "Upon information and belief, the petitioner did knowingly waive his right to the advice and assistance of counsel with full knowledge of the significance of such act" (R. 42).

Paragraph 9, dealing with the "brief discussion" which allegedly took place when respondent waived a trial by jury, was identical in both returns, with the exception of the portion indicated below in italics, which was omitted from the substituted return:

> "Upon information and belief, petitioner then moved to have the case tried without a jury, by the judge alone. There was a brief discussion between the court, the petitioner, and the Assistant United States Attorney, at which it was determined that a form of waiver of petitioner's constitutional right to a jury trial should be prepared by the Assistant United States Attorney, *which would in every respect conform to the law as laid down by the Supreme Court of the United States.* Such a waiver was prepared and a copy thereof is hereto annexed and marked 'Exhibit A'. It was executed in writing by the petitioner and approved by the Assistant United States Attorney and by the court." (R. 5; Exhibit B hereto, p. 18).

Neither the court clerk's minutes, set forth in paragraph 3 of respondent's original petition (Government's Brief, Appendix D, p. 66) and in paragraph 3 of his substituted petition (R. 2), nor the minutes of the Southern District reporter, a certified transcript of which is annexed hereto as Exhibit E, report such a discussion.

It is interesting to note that both returns were executed and verified by the same persons.

In addition to the pleadings described above, which denied in detail the allegations of the first return it appears from the affidavit, Exhibit A hereto (pars. 12-16), that a pleading intended to serve as a traverse to the substituted return was prepared but was not filed by respondent's attorney in the court below, because of his belief that such action would violate the understanding upon which the original petition and traverse were withdrawn and because of his conviction that a traverse of the substituted return would merely delay decision of the case for the respondent on the bare question of law presented by the substituted petition. This pleading has been printed as Exhibit D to this petition.

2. In any further proceedings which may be had, the opinion and mandate of this Court, unless modified as herein requested, may be held to bar a determination of whether respondent intelligently and competently waived his constitutional rights to the assistance of counsel and to a trial by jury.

The power of an inferior court with respect to a case which has been reversed and remanded by this Court has been defined by this Court as follows:

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law

of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. * * * But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. * * * The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly."

In re Sanford Fork & Tool Company, 160 U. S. 247, 255-256 (1895).

Accord:

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 140 (1940).

As noted above, neither this Court nor the court below have referred to the course of proceedings outlined in Point 1 hereof; this Court merely states in the portions of its opinion quoted above, at pages 2-3, that the facts set forth in the untraversed return are accepted, and that it would be difficult to conceive of a record which sets forth more clearly "* * * a set of circumstances in which there was such a free choice by a self-determining individual."

Counsel submit that, unless modified, the opinion and mandate herein may be held a bar in any further proceedings for the determination of questions indicated in Point 1 hereof, which appear to have been, but in fact never were, decided by this Court.

Cf. *Ohio Oil Company* v. *Thompson*, 120 F. (2d) 831 (C. C. A. 8, 1941), cert. denied 314 U. S. 658.

Moreover, an appeal to this Court will probably be taken from any decision in such proceedings—a result which might be avoided by clarification of the opinion at this time.

In order to provide a flexible procedure for disposition of the case below, counsel respectfully request that the case be remanded for such further proceedings, not inconsistent with the opinion, as the Circuit Court of Appeals for the Second Circuit may, in its discretion, deem proper to determine the question of whether the requirements of the *Zerbst* and *Patton* cases were observed; and that the opinion of this Court clearly indicate that this question is left open.

If this be done, it may be that the court below will deem it proper to retain jurisdiction to dispose of the case by permitting respondent to traverse the Government's return or to amend his petition pursuant to Section 760 of the Revised Statutes, which provides:

> "The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained." (28 U. S. C., § 460.)

Such a procedure would be extraordinary, but, in view of all the proceedings which have been had before the court below and of the difficulty of raising the point on appeal, this would certainly appear to be the most expedi-

tious way of disposing of the question, if the court below feels that respondent has made out a point which is bound to succeed on the appeal. Cf. *Tibery* v. *Warren*, 192 Fed. 458 (C. C. A. 9, 1911), in which the court permitted a supplemental return to be filed after final judgment and discharge of the petitioner.

CONCLUSION.

It is prayed that this cause be set down for reargument at the earliest convenient session of this Court.

Respectfully submitted,

ROBERT G. PAGE,
Attorney for Respondent.

EDWARD D. WYNOT,
Of Counsel.

January 14, 1943

Certificate Under Rule 33.

ROBERT G. PAGE, attorney for the respondent, certifies that he is a member of the Bar of this Court; that he has read the foregoing petition and knows the contents thereof; and that the foregoing petition is submitted in good faith and not for purposes of delay.

ROBERT G. PAGE.

Washington, D. C.,
January 15, 1943.

Exhibit A.

Affidavit of Frank J. Walsh, Attorney for Respondent Before the Court Below.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 79

WILLIAM A. ADAMS, Warden of the City Prison of Manhattan, and JAMES E. MULCAHY, United States Marshal,

Petitioners,

v.

THE UNITED STATES OF AMERICA, ex rel. GENE MCCANN,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

State of New York,
County of Bronx—ss.:

FRANK J. WALSH, being duly sworn, deposes and says:

1. I reside at Number 831 Waring Avenue, Borough of the Bronx, New York City, and am a practicing attorney of the Supreme Court of the State of New York, having been admitted to the Bar of the First Judicial Department on November 13th 1923.

2. On February 20th 1942, the respondent herein was appearing before the Circuit Court of Appeals for the Second Circuit for oral argument upon a pending applica-

Exhibit A.

Affidavit of Frank J. Walsh, Attorney for Respondent Before the Court Below (continued).

tion he had made for certain relief to permit him to perfect his appeal at the place of his custody. I was present in the Courtroom on that day and, upon learning that the respondent was without an attorney and without funds to retain one, and after examining the papers on file in the Trial Court and its Clerk's trial minutes and learning that the respondent was convicted without counsel and a jury trial, I volunteered to act as his attorney without compensation. Whereupon, the respondent accepted my offer and pointed out to the Court below that I was not a member of the Bar of that Court but it granted me special permission to appear and make oral application for his discharge from custody upon the ground that his conviction was invalid in that the Trial Court had failed to comply with the conditions requisite and necessary to sanction his trial without counsel and a jury—as laid down by this Court in *Johnson* v. *Zerbst*, 304 U. S. 458; *Patton* v. *United States*, 281 U. S. 276, etc.

3. The oral application culminated in the per curiam opinion, dated March 3rd 1942 (Government's brief, Appendix B, pp. 57-58), and in which the Court below stated that respondent "may, if he wishes, have a writ of habeas corpus issued out of this court upon a duly verified petition stating the circumstances by which he asserts he was improperly deprived of a trial by jury. The Warden of the City Prison is requested to allow him access to a notary public to verify such a petition after it has been prepared presumably by the attorney who filed the brief now before us."

4. Pursuant to the said per curiam opinion, I prepared the original petition, sworn to March 12th 1942, which appears as Appendix D to the Government's brief (pp. 64-68).

Exhibit A.

Affidavit of Frank J. Walsh, Attorney for Respondent Before the Court Below (continued).

5. A writ of habeas corpus issued out of the Court below on the same day was returnable on the 16th of March 1942 but was adjourned to March 18th.

6. To the aforesaid original petition, the Government filed a return, sworn to March 16th 1942, a copy of which was served on me and is annexed hereto and marked Exhibit 1.

7. The respondent prepared an affidavit in reply to this return, sworn to March 18th 1942, the original of which is annexed hereto and marked as Exhibit 2.

8. At the hearing on March 18th 1942, on the return of the original petition, there was handed up to the Court below the said original petition (pp. 64-68, Gov's brief), the Government's return thereto (Exhibit 1 annexed hereto), and the respondent's reply affidavit to the said return (Exhibit 2 annexed hereto). After examining the said original petition, return and respondent's reply thereto, Judge Learned Hand stated that the return and the respondent's reply thereto raised many disputed questions of fact which may make it necessary for the Court to hold hearings to determine them. Judge Hand further stated that he thought the case could be disposed of on the bare question of law, namely: whether the respondent's constitutional rights were violated by the Trial Court in permitting him to waive a trial by jury without the advice of counsel.

9. Judge Hand then stated that the Court would return the papers if counsel for the respondent cared to file an amended petition eliminating all disputed questions of fact and confined only to that one question of law. I accepted the Court's suggestion and withdrew the original petition and respondent's reply to the Government's return. However, one copy of the original petition was inadvertently left in the possession of the Clerk of the Circuit Court and

Exhibit A.

Affidavit of Frank J. Walsh, Attorney for Respondent Before the Court Below (continued).

is still in his files with a clear penciled notation thereon, per Deputy Clerk Mr. Bell, stating that the original petition was withdrawn by Mr. Walsh, myself, at the suggestion of the Court.

10. Thereafter, I served and filed the amended petition (R. pp. 2-3) on and sworn to March 20th 1942, to which the Government filed its return, sworn to March 20th 1942 (R. pp. 4-7), which return was substantially the same as the return it filed to the original petition (Exhibit 1 annexed hereto).

11. Prior to the filing of the Government's return to the amended petition, the respondent apparently anticipating the possibility that the Government would inject disputed questions of fact into its return to his amended petition, had prepared a supplemental affidavit, sworn to March 20th 1942, to serve as a reply to the Government's return if it raised disputed questions of fact. The original of the respondent's said supplemental affidavit is annexed hereto as Exhibit 3.

12. The respondent, after reading the Government's return to the amended petition, instructed me that under no circumstances should I leave uncontroverted the disputed questions of fact raised therein and directed me to file his said supplemental affidavit in reply thereto (Exhibit 3 annexed hereto), if I thought such filing would not delay the Court's decision.

13. It appeared to me at the time that the Government, in raising disputed questions of fact in its return, had violated the general understanding arrived at before the Court below pursuant to which I withdrew, at the suggestion of the Court, the original petition and respondent's reply to the Government's original return and thereafter filed the amended petition.

Exhibit A.

Affidavit of Frank J. Walsh, Attorney for Respondent Before the Court Below (continued).

14. From the various suggestions of and discussions before the Court below, I was convinced that it would take no cognizance of the disputed questions of fact raised in the Government's return to the amended petition and I, therefore, disregarded the respondent's instructions to file his supplemental affidavit in reply thereto as I thought it might delay the Court's decision.

15. Throughout all of the proceedings had in the Court below I was convinced that it ultimately would dispose of the case upon the bare question of law it had suggested at the time I withdrew the original petition and upon which it subsequently decided it in the respondent's favor.

16. I then believed and now believe that the respondent was not advised of his constitutional rights to have counsel appointed to him without expense or otherwise nor of his constitutional rights to be tried by a jury. Had I not been convinced that the Court below would decide the case on the only point of law upon which it ultimately did decide it, I would have insisted that those issues be decided and never would have withdrawn the original petition and respondent's reply to the Government's return thereon, nor would I have permitted to be made the incomplete record upon which was based the decision of this Court of December 21st 1942.

(Signed) FRANK J. WALSH.

Sworn to before me this

9th day of January 1943.

(Signed) SIMON ALVIN KIMMEL.

Notary Public.

Bronx Co. Clk's No. 86. Reg. No. 78-K-44.

Commission Expires March 30, 1944.

(Seal)

Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit).

Government's Return to the Respondent's Original Petition.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA ex rel. GENE MCCANN,
Petitioner,

—v—

WILLIAM A. ADAMS, Warden of the City Prison of Manhattan, 125 White Street, New York City, and/or the UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondents.

RETURN TO WRIT OF HABEAS CORPUS.

C 109/231.

JAMES MULCAHY, United States Marshal for the Southern District of New York and one of the alternate respondents herein, by Leo Lowenthal, Chief Deputy United States Marshal, for his return to the writ of habeas corpus herein and his answer to the petition:

1. Denies upon information and belief each and every allegation contained in paragraphs numbered 2nd, 3rd, 4th and 5th.

The respondent, further answering the said petition, alleges:

2. As United States Marshal for the Southern District of New York, respondent received a regular commitment under the seal of the United States District Court for

Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit). Government's Return to the Respondent's Original Petition (continued).

the Southern District of New York and has at all times been ready to deliver the body of Gene McCann, the prisoner mentioned therein, to a United States penitentiary to serve the sentence imposed upon him, but has been stayed from so doing by the filing of a notice of appeal.

3. Upon information and belief, the petitioner was at all times aware of his constitutional rights to the advice and assistance of counsel and to a jury trial and did knowingly waive both rights with full knowledge of the significance of such acts.

4. Upon information and belief, petitioner was indicted on or about February 18, 1941, and upon arraignment on said indictment, requested an adjournment thereof pending the making by him of a motion to quash the indictment for various reasons.

5. Upon information and belief, the aforesaid motion having been made upon voluminous papers and decided adversely to the petitioner herein, petitioner applied to this Court for a writ of mandamus to compel the District Court to grant his motion, which application was denied.

6. Upon information and belief, upon petitioner's refusing to enter a plea of either guilty or not guilty to the indictment, the District Court ordered that a plea of not guilty be entered, and advised the petitioner to retain counsel to defend him, which petitioner refused to do, stating in substance that he desired to represent himself, that the case was very complicated, and that he was so familiar with its details that no attorney would be able to give him as competent representation as he would be able to give himself.

7. Upon information and belief, thereafter petitioner brought three more motions in succession, seeking various forms of relief, all of which were prepared and argued by himself.

Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit). Government's Return to the Respondent's Original Petition (continued).

8. Upon information and belief, the trial commenced on July 7, 1941. When the case was called for trial in the Calendar Part of the District Court, the Court, Hon. Merrill E. Otis presiding (who subsequently tried the case), inquired of the petitioner whether he had counsel; petitioner replied he desired to represent himself; the Court inquired whether he was admitted to the Bar; petitioner replied that he was not, but that he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be.

9. Upon information and belief, petitioner then moved to have the case tried without a jury by the judge alone. There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney, at which it was determined that a form of waiver of petitioner's constitutional right to a jury trial should be prepared by the Assistant United States Attorney which would in every respect conform to the law as laid down by the Supreme Court of the United States. Such a waiver was prepared and a copy thereof is hereto annexed and marked "Exhibit A". It was executed in writing by the petitioner and approved by the Assistant United States Attorney and by the Court.

10. Upon information and belief, the trial which ensued took two and a half weeks, during which the defendant represented himself without counsel.

11. Upon information and belief, he was convicted and sentenced, and filed an appeal and has up to this time and is at this very moment conducting his appeal in person although this Court, as did the Court below, has at times suggested to him the advisability of his retaining counsel.

12. Upon information and belief, at petitioner's trial in

Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit). Government's Return to the Respondent's Original Petition (continued).

the Court below, testimony disclosed that petitioner in person had in 1933 brought suit in the United States District Court against over six hundred individual defendants, demanding thirty million dollars damages for conspiracy in restraint of his trade, and had represented himself therein in person although he had been assisted at the trial thereof in 1936 by an attorney who appeared only, however, as "of counsel" to the petitioner. Testimony also disclosed that the petitioner conducted his own appeal in that matter without the aid of counsel to this Court and to the Supreme Court of the United States. The testimony also disclosed that the petitioner had brought suit, prior to his indictment, in the Supreme Court of the State of New York against Joseph Brieloff and others who were subsequently named in the indictment as "victims", had conducted the case in person without counsel and had tried it in person in the said Supreme Court. Respondent refers to this testimony to show petitioner's familiarity with courts and legal proceedings and the falsity of petitioner's statements in paragraphs numbered 2nd and 3rd of his petition that he was not aware of his constitutional right to counsel.

WHEREFORE, respondent prays that the writ of habeas corpus be dismissed and the relator be remanded to the custody of the United States Marshal for the Southern District of New York to be dealt with in accordance with law.

JAMES MULCAHY by
LEO LOWENTHAL.
JAMES MULCAHY, Respondent
by LEO LOWENTHAL, Chief Deputy
United States Marshal.

Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit). Government's Return to the Respondent's Original Petition (continued).

State of New York,
County of New York,
Southern District of New York—ss.:

LEO LOWENTHAL, Chief Deputy United States Marshal for the Southern District of New York, being duly sworn, deposes and says that he is acting for James Mulcahy, United States Marshal; that he has read the foregoing return and knows the contents thereof; that the same is true to his own knowledge except such matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sources of deponent's knowledge and grounds of his belief as to all matters herein alleged upon information and belief consist of the official docket of the United States District Court for the Southern District of New York, and statements made to him by Richard J. Burke, Assistant United States Attorney for the Southern District of New York.

Leo Lowenthal.
LEO LOWENTHAL.

Sworn to before me this
16th day of March, 1942.

Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit), Government's Return to the Respondent's Original Petition (continued).

"EXHIBIT A".

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

—v—

GENE McCANN,

Defendant.

I, GENE McCANN, the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the Court of my constitutional rights.

Dated: New York, N. Y., July 7, 1941.

GENE McCANN (signed)
Defendant, appearing personally

Consented to:

RICHARD J. BURKE (signed)
Assistant United States Attorney

SO ORDERED:

MERRILL E. OTIS
U. S. District Judge

Exhibit B (Annexed as Exhibit 1 to Mr. Walsh's Affidavit). Government's Return to the Respondent's Original Petition (continued).

UNITED STATES CIRCUIT OF APPEALS

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA ex rel. GENE MCCANN,

Petitioner,

—v—

WILLIAM A. ADAMS, Warden of the City Prison of Manhattan, 125 White Street, New York City, and/or the UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondents.

AFFIDAVIT.

C 109/231.

RICHARD J. BURKE, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York and is in charge of the prosecution of the above matter on behalf of the United States Marshal for the Southern District of New York.

That he has read the foregoing return to the writ of habeas corpus and knows the contents thereof, and the same is true to his own knowledge, including all matters therein stated to be alleged on information and belief.

Richard J. Burke
RICHARD J. BURKE

Sworn to before me this
16th day of March, 1942.

Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit).

Petitioner's Affidavit in Reply to the Government's Return to His Original Petition (continued).

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA, ex rel. GENE MCCANN,
Petitioner,

For a Writ of Habeas Corpus

—against—

WILLIAM A. ADAMS, Warden of City Prison of Manhattan, 125 White Street, New York City, and/or the United States Marshal for the Southern District of New York,
Respondents.

PETITIONER'S AFFIDAVIT IN REPLY TO THE OPPOSING RETURN.

County of New York,
State of New York—ss.:

GENE MCCANN, being duly sworn, deposes and says:

1. I am the petitioner herein and I make this affidavit in reply to the hearsay and other averments alleged, mainly upon information and belief, in the Return interposed by the respondent James Mulcahy, United States Marshal for the Southern District of New York, by Leo Lowenthal, Chief Deputy United States Marshal, in opposition to my petition for a writ of habeas corpus.

2. I deny that I was aware of my constitutional rights to advice and assistance of counsel without expense to me or otherwise and to a jury trial at the time I plead to the indictment or prior to or during the trial of the case at bar.

Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit). Petitioner's Affidavit in Reply to the Government's Return to His Original Petition (continued).

3. I deny that I at any time knowingly, expressly, impliedly or otherwise waived my constitutional rights to the advice and assistance of counsel.

4. I also deny that I knowingly waived my constitutional rights to a jury trial with full knowledge of the significance of such act.

5. I did not become aware of either of these constitutional rights until February 20th 1942 when, in the Courtroom of this Court, I was advised thereof by Frank J. Walsh, Esq., who appears as my counsel on the instant application.

6. The indictment herein was returned by the January 1941 Grand Jury of the Court below whose Foreman, C. Douglass Greene, was then a partner of Post & Flagg, members of the New York Stock Exchange and defendants in my then pending and bitterly contested civil action against his said partnership firm and others under the New York Anti-Trust Law (Donnelly Act) for a restraint of my intrastate business. The title of said action is *Gene McCann* v. *Richard Whitney as President of the New York Stock Exchange, et al.* (New York County Supreme Court).

7. While the presentment was being made to the grand jury I requested its Foreman to be heard upon a waiver of immunity in accordance with the requirements of Section 257 of the New York Code of Criminal Procedure, as amended, and my request was denied.

8. Before I plead to the indictment I moved the Court below to quash it or to hold a preliminary hearing to that end upon the ground that:

(a) The Foreman and eight other members of the jury were prejudiced and disqualified to sit on a

Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit). Petitioner's Affidavit in Reply to the Government's Return to His Original Petition (continued).

jury before which a presentment was being made against me;

(b) The indictment was void because twelve qualified jurors did not vote therefor (the Government stipulated on the trial that one qualified juror was not present and did not vote thereon and I was informed by a qualified juror that he and another qualified juror did not vote therefor);

(c) It was mandatory upon the Court to quash the indictment because the jury refused to hear me;

(d) The indictment does not state a crime on its face;

(e) And upon divers other grounds.

My motion was denied in toto and an exception was duly served and filed.

9. While a motion for leave to reargue my said motion to quash, etc., was pending I appeared before the Honorable Edward A. Conger, then presiding in the Court below, to plead to the indictment and requested the plea be postponed until said motion was decided. Judge Conger said he would enter a plea of not guilty for me and the record would show that I refused to plead. He thereupon released me and I remained on my own recognizance until after the trial.

10. I deny that Judge Conger at the time I appeared before him to plead to the indictment and that any District Court Judge at any time "advised" me "to retain counsel to defend" myself and that I "refused to do" so.

11. I also deny that I ever stated "in substance" or otherwise to Judge Conger or to any District Court Judge that I "desired to represent" myself in the case at bar and that "no attorney would be able to give" me "as competent representation as" I "would be able to give" myself.

12. Judge Conger subsequently granted my application

Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit). Petitioner's Affidavit in Reply to the Government's Return to His Original Petition (continued).

to defend this cause as a poor person pursuant to Section 832, Title 28, U. S. Code.

13. I deny that any Judge of this or of the Court below has at any time suggested to me the advisability of my retaining counsel.

14. I also deny the allegations in paragraph "8" of the opposing Return.

15. I admit that I made several motions directed to the validity of the indictment and argued them myself but I deny that I alone prepared the motion papers and memoranda of law interposed by me in support of the motions. I had the advice and assistance of such young attorneys as I could engage and who were willing to assist me in the preparation of such motion papers and memoranda for the few dollars I was able to pay them for the work. My oral arguments in support of the motions were based on the facts, the advice these attorneys gave me and the law set forth in the memoranda they prepared.

16. I am not an attorney and at no time have I represented myself as such.

17. Although I appeared pro se in my civil action under the Sherman Act in the Court below, entitled *Gene McCann v. New York Stock Exchange, et al.*, which was before this Court on appeal (107 Fed. [2nd] 908) and in connection with which I filed a petition for certiorari in the United States Supreme Court (No. 773 October Term 1939), Hallam M. Richardson acted as my trial counsel in that case, as disclosed by the record on file in this Court, and I had the assistance and advice of counsel in the preparation of said petition for certiorari, briefs, pleadings and all other documents having to do with that action and the respective appeals therein.

18. I also had the advice and assistance of counsel in the preparation of the pleadings and all papers and memo

Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit). Petitioner's Affidavit in Reply to the Government's Return to His Original Petition (continued).

randa having to do with the two civil actions, in quantum meruit, which I brought against the principle prosecuting witnesses in the case at bar to recover for work, labor and services duly performed and for the loss of prospective profits duly sustained by reason of their breach of agreements with me. I appeared pro se in both those actions but Mr. Richardson tried one of them and examined certain defendants therein before trial. I tried the other because he was engaged in Court with another case when it was reached for trial and I was unable to secure an adjournment or another competent attorney to try it at the time.

19. I deny there was before the Court below at any time any facts or testimony with respect to my prosecution of the aforesaid civil litigation and my appearance therein pro se that is contrary to the facts hereinabove stated.

20. The trial of this cause was repeatedly postponed from week to week and when I appeared in Court on July 7th 1941 I verily believed my appearance was required merely for the purpose of answering another of the routine summer calendar calls. I was not properly prepared to go to trial and I moved for an adjournment until witnesses essential to my defense returned from their summer vacations and upon other good and sufficient grounds but Judge Otis denied my application and directed that the trial proceed immediately before him.

21. Then and still believing the indictment does not state a crime on its face and that it was returned by prejudiced and disqualified jurors and being unable to secure until after a trial a review by this Court

(a) as to the validity of the indictment, and

(b) as to the respective prejudices and qualifications of the grand jurors that returned it

Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit). Petitioner's Affidavit in Reply to the Government's Return to His Original Petition (continued).

I, personally, without the aid or advice of counsel, and without being aware of or being advised by Judge Otis or anyone else of my constitutional rights to a jury trial consented to the waiver of a trial without a jury and to proceed to trial before Judge Otis.

22. Judge Otis thereupon directed the United States Attorney to prepare a stipulation for him and me to sign. Within a few moments thereafter the United States Attorney held before me a stipulation drawn by him. It was not before me long enough to read and carefully digest its contents nor to realize the significance thereof and it was withdrawn from my sight immediately after I hurriedly affixed my signature thereto. Although I requested the United States Attorney to furnish me with a copy of the stipulation at the time I signed it and he agreed to do so immediately I never received a copy thereof or became aware of its contents until February 27th 1942.

23. I emphatically deny the averment at paragraph "8" of the opposing Return which states:

> "There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney, at which it was determined that a form of waiver of petitioner's constitutional right to a jury trial should be prepared by the Assistant United States Attorney which would in every respect conform to the law as laid down by the Supreme Court of the United States."

No such discussion was ever had and no mention of constitutional rights or laws laid down by the Supreme Court were ever made by either Judge Otis the Assistant United States Attorney nor by myself in connection with the waiver of a jury trial nor in connection with the stipulation

Exhibit C (Annexed as Exhibit 2 to Mr. Walsh's Affidavit). Petitioner's Affidavit in Reply to the Government's Return to His Original Petition (continued).

I had nothing whatsoever to do with the preparation of the stipulation—the wording of which should be construed as favoring the Assistant United States Attorney who drew it.

24. I appeared before the Court below to plead to the indictment and proceeded to trial without the benefit or protection of counsel and sought to establish my innocence of the alleged crimes to the best of my ability because I was unable to defray the cost of competent counsel and I verily believed the charges were too ridiculous to ever be sustained. Especially since they were made and supported by prosecuting witnesses whose deliberate falsifications I had discovered and knew to be matters of record in documents filed by them with the Securities & Exchange Commission and the Department of Law of the State of New York, as well as in their testimony in the civil actions I brought against them after I discovered their true character which made it necessary for me to sever relations with them. Such actions were long pending in the New York Supreme Court before these prosecuting witnesses got together and had contact with the Governmental agencies that brought about the instant prosecution which is predicated upon my refusal to subject myself to civil liabilities and criminal prosecution through solicitation of subscriptions for fraudulent stock in companies controlled by them.

(Signed) GENE McCANN.

Sworn to before me this
18th day of March, 1942.

JOHN J. O'LEAR, JR.,
Notary Public.
Queens Co. No. 3194, Reg. No. 7916.
N. Y. Co. No. 215, Reg. No. 3-0-123.
Commission Expires March 30, 1943.

(Seal)

Exhibit D (Annexed as Exhibit 3 to Mr. Walsh's Affidavit).

Petitioner's Supplemental Affidavit in Reply to the Government's Return to His Amended Petition.

UNITED STATES CIRCUIT OF APPEALS

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA, ex rel.,
GENE MCCANN,

Petitioner.

For a Writ of Habeas Corpus

—against—

WILLIAM A. ADAMS, Warden of City Prison of Manhattan, 125 White Street, New York City, and/or the UNITED STATES MARSHAL for the Southern District of New York,

Respondents.

PETITIONER'S SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF HIS APPLICATION FOR A WRIT OF HABEAS CORPUS.

County of New York,
State of New York—ss.:

GENE MCCANN, being duly sworn, deposes and says:

1. He is the Petitioner herein and interposes this supplemental affidavit in support of his instant application for a writ of habeas corpus.

2. Your petitioner secured an order from the Court below to defend this cause as a poor person, pursuant to Section 832, Title 28, U. S. Code, and he defended it in person.

Exhibit D (Annexed as Exhibit 3 to Mr. Walsh's Affidavit). Petitioner's Supplemental Affidavit in Reply to the Government's Return to His Amended Petition (continued).

3. Before your petitioner plead to the indictment, he made several motions directed to its validity and for other relief which he argued himself from his moving papers and memoranda which were prepared principally by young attorneys who were willing to do the work for the few dollars he was able to pay them therefor at the time.

4. At no time has your petitioner held himself out as an attorney or represented himself as such.

5. Although your petitioner appeared as the plaintiff in person in his civil action under the Sherman Act in the Court below, entitled *Gene McCann* v. *New York Stock Exchange*, et al. (L. 55-231) which action was before this Court on appeal (107 Fed. [2nd] 908), and in connection with which your petitioner filed a petition for certiorari in the United States Supreme Court (No. 773 October Term 1939), Hallam M. Richardson, Esq., acted as your petitioner's trial counsel in that case, as disclosed by the Record on file in this and the Supreme Court, and he had the assistance and advice of counsel in the preparation of said petition for certiorari, briefs, pleadings and all other documents having to do with his prosecution of that action and the respective appeals therein.

6. Your petitioner also had the advice and assistance of counsel in the preparation of the pleadings and all papers and memoranda having to do with the two civil actions which he brought in quantum meruit against the principle prosecuting witnesses in the case at bar to recover for work, labor, services and loss of prospective profits. These civil actions were long pending before such witnesses appeared before the Grand Jury which returned the indictment in the case at bar. Your petitioner appeared as the plaintiff in person in both those civil actions but Mr.

Exhibit D (Annexed as Exhibit 3 to Mr. Walsh's Affidavit). Petitioner's Supplemental Affidavit in Reply to the Government's Return to His Amended Petition (continued).

Richardson tried one of them and examined certain defendants therein before trial. Your petitioner tried the other because Mr. Richardson was not available at the time it was reached for trial and your petitioner was unable to secure an adjournment or other competent counsel to try it.

7. While an application for reargument of a motion denying a quashal of the indictment was pending in the Court below, your petitioner appeared before the Honorable Edward A. Conger, then presiding therein, to plead to the indictment and requested the plea be postponed until said application was decided. Judge Conger said he would enter a plea of not guilty for your petitioner and the record would show that your petitioner refused to plead. He thereupon released your petitioner and he remained on his own recognizance until after the trial.

8. Your petitioner defended this cause in person because he was without income, funds or other assets with which to pay for the services of competent counsel.

9. At no time did the Court below offer to assign counsel or the assistance of counsel to your petitioner in this cause nor advise him of his constitutional rights thereto nor did he specifically waive such rights.

10. At no time did the Court below nor anyone else advise your petitioner of his constitutional rights to a jury trial of this cause.

11. Your petitioner did not become aware of his constitutional rights to the advice and assistance of counsel in this cause, without expense to him or otherwise, nor of his constitutional rights to a jury trial until February 20th 1942 when, in the Courtroom of this Court, he was advised thereof by Frank J. Walsh Esq., who appears as

Exhibit D (Annexed as Exhibit 3 to Mr. Walsh's Affidavit). Petitioner's Supplemental Affidavit in Reply to the Government's Return to His Amended Petition (continued).

your petitioner's attorney on his instant application for a writ of habeas corpus.

12. Your petitioner consented to a trial of this cause without a jury and he hurriedly signed a stipulation, prepared by the United States Attorney, waiving his constitutional rights thereto without carefully reading it or realizing the significance of its contents or of the significance of his acts and all without the advice or assistance of counsel.

13. Although your petitioner requested the United States Attorney to furnish him with a copy of the stipulation at the time he signed it and the United States Attorney agreed to do so immediately, your petitioner never received a copy thereof until February 27th 1942 and he was not fully cognizant of its contents until several days prior thereto.

(Signed) Gene McCann.
GENE McCANN.

Sworn to before me this
20th day of March 1942.
THOS. D. ROMANELLA,
Notary Public.
Queens County No. 1546, Queens County Reg. No. 6961.
New York County No. 663, New York Co. Reg. No. 3-R-411.
Term Expires March 30, 1943.

Exhibit E.

Trial Court's Stenographer's Minutes.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

vs.

GENE McCANN

State of New York,
County of New York—ss.:

SAMUEL BRUCKHEIMER, being duly sworn, deposes and says: that I have been a Certified Shorthand Reporter for more than twenty years, and that as such I was employed by Southern District Court Reporters to report the proceedings in the above case and that the attached page is a true and accurate transcript of my shorthand notes.

(Signed) SAMUEL BRUCKHEIMER.

Sworn and subscribed to before me this
7th day of January, 1943.
(Signed) W. G. BRIGGS.

Notary Public, Bronx County.
Bronx Co. Clk's No. 123.
N. Y. Co. Clk's No. 1005.
Commission Expires March 30, 1943.

Exhibit E.

Trial Court's Stenographer's Minutes (continued).

"(July 7, 1941)

Before HON. MERRILL E. OTIS

Mr. McCann: I move the Court to try the case of the United States of America v. Gene McCann without a jury and have the case tried by the presiding Judge.

The Court: Defendant, in his own proper person, having moved for a trial of the case without a jury and having said in open court he will sign the consent as soon as drawn, and the Government consenting, the motion is granted. If counsel wishes to make any motion in addition I want the record to show what the application is, who the witnesses are who have not been served, what they will testify to, so that I can determine whether their testimony is material or not material.

* * * * *

SOUTHERN DISTRICT COURT REPORTERS."

SUPREME COURT OF THE UNITED STATES.

No. 79.—October Term, 1942.

William A. Adams, Warden of the City Prison of Manhattan, and James E. Mulcahy, United States Marshal, Petitioners, *vs.* The United States of America, *ex rel.* Gene McCann.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 21, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court

This is a review of an order by the Circuit Court of Appeals for the Second Circuit discharging the relator McCann from custody. We accept as facts, as did the court below, those set forth in the untraversed return to the writ of *habeas corpus* in that court.

McCann was indicted on six counts for using the mails to defraud, in violation of Section 215 of the Criminal Code, 18 U. S. C. § 338. From the time of his arraignment on February 18, 1941, to the prosecution of his appeal in the court below, McCann insisted on conducting his case without the assistance of a lawyer. When called upon to plead to the indictment, he refused to do so; a plea of not guilty was entered on his behalf. The district court at that time advised McCann to retain counsel. He refused, however, "stating in substance that he desired to represent himself, that the case was very complicated, and that he was so familiar with its details that no attorney would be able to give him as competent representation as he would be able to give himself".

When the case came on for trial on July 7, 1941, McCann repeated, in reply to the judge's inquiry whether he had counsel, that he wished to represent himself. In response to the court's further inquiry whether he was admitted to the bar, McCann "replied that he was not, but that he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney

could ever be."[1] McCann "then moved to have the case tried without a jury by the judge alone. There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney", after which McCann submitted the following over his signature: "'I, Gene McCann, the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the Court of my constitutional rights.'" The Assistant United States Attorney consented, and the judge (one of long trial experience and tested solicitude for the civilized administration of criminal justice) entered an order approving this "waiver".

The trial then got under way. It lasted for two weeks and a half, and throughout the entire proceedings McCann represented himself. He was convicted on July 22, 1941, and was sentenced to imprisonment for six years and to pay a fine of $600. He took an appeal, and the trial judge fixed bail at $10,000. Being unable to procure this sum, he remained in custody. Then followed applications to the Circuit Court of Appeals, likewise pressed by McCann himself, for extending the time for filing a bill of exceptions. In these proceedings both the trial and appellate courts again suggested to McCann the advisability of being represented by counsel. After having personally made these numerous applications, McCann finally secured the assistance of an attorney. The latter applied to the Circuit Court of Appeals for reduction of bail. It was so reduced. But at the same time the court suggested that McCann take out a writ of *habeas corpus*, returnable to the court, to raise the question whether, in the circumstances of the case, "the judge had jurisdiction to try him".

As is pointed out in the opinion of the Circuit Court of Appeals, "At no time did he [McCann] indicate that he wished a jury or that he repented of his consent—either while the cause was in the district court or in this court—until the attorney, who now represents him, in March, 1942, raised the point" at the court's invitation. The "point" thus projected into the case by the Circuit Court of Appeals was presented, in its own words, "in the barest possible form: Has an accused, who is without counsel, the power at his

[1] McCann had brought suit in 1933 against the New York Stock Exchange, its officers and members; the Better Business Bureau of New York, and a large number of other persons, seeking thirty million dollars damages for conspiracy in restraint of trade. He represented himself in this extensive litigation, and personally brought appeals to the Circuit Court of Appeals and to this Court. See McCann v. New York Stock Exchange, 80 F. 2d 211; 107 F. 2d 908; 309 U. S. 684.

own instance to surrender his right of trial by jury when indicted for felony?"[2] The Circuit Court of Appeals, with one judge dissenting, answered this question in the negative. It held that no person accused of a felony—who is himself not a lawyer—can waive trial by a jury, no matter how capable he is of making an intelligent, informed choice and how strenuously he insists upon such a choice, unless he does so upon the advice of an attorney. 126 F. 2d 774. The obvious importance of this question to the administration of criminal justice in the federal courts led us to bring the case here. 316 U. S. 655.

A jurisdictional obstacle to a consideration of this issue is pressed before us. It is urged that the Circuit Court of Appeals had no jurisdiction to issue the writ of *habeas corpus* in this case. The discussion of this question took an extended range in the arguments at the bar, but in the circumstances of this case the matter lies within a narrow compass. Uninterruptedly from the first Judiciary Act (Section 14 of the Act of September 24, 1789, 1 Stat. 73, 81), to the present day (Section 262 of the Judicial Code, 28 U. S. C. § 377), the courts of the United States have had powers of an auxiliary nature "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law". In *Whitney* v. *Dick*, 202 U. S. 132, this Court held that where no proceeding of an appellate character is pending in a circuit court of appeals, the authority to issue auxiliary writs does not come into operation. A circuit court of appeals cannot issue the writ of *habeas corpus* as "an independent and original proceeding challenging *in toto* the validity of a judgment rendered in another court". But the Court also recognized that there was power to issue the writ "where it may be necessary for the exercise of a jurisdiction already existing". 202 U. S. at 136-37. In the case at bar a proceeding of an appellate character was pending in the Circuit Court of Appeals, for McCann had already filed an appeal from the judgment of conviction. There was, therefore, "a jurisdiction already existing" in the Circuit Court of Appeals. But could the issuance of the writ be deemed "necessary for the exercise" of that jurisdiction?

[2] Felony, it may not be irrelevant to note, is a verbal survival which has been emptied of its historic content. Under the federal Criminal Code all offenses punishable by death or imprisonment for more than a year are felonies. Section 335 of the Criminal Code, 18 U. S. C. § 541.

Procedural instruments are means for achieving the rational ends of law. A circuit court of appeals is not limited to issuing a writ of *habeas corpus* only when it finds that it is "necessary" in the sense that the court could not otherwise physically discharge its appellate duties. Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it. Undoubtedly therefore, the Circuit Court of Appeals had "jurisdiction", in the sense that it had the power, to issue the writ as an incident to the appeal then pending before it. The real question is whether the Circuit Court of Appeals abused its power in exercising that jurisdiction in the situation that confronted it.

Of course the writ of *habeas corpus* should not do service for an appeal. *Glasgow v. Moyer*, 225 U. S. 420, 428; *Matter of Gregory*, 219 U. S. 210, 213. This rule must be strictly observed if orderly appellate procedure is to be maintained. Mere convenience cannot justify use of the writ as a substitute for an appeal. But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts. In exceptional cases where, because of special circumstances, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice, the writ of *habeas corpus* is available to a circuit court of appeals.

The circumstances that moved the court below to the exercise of its jurisdiction were the peculiar difficulties involved in preparing a bill of exceptions. The stenographic minutes had never been typed. The relator claimed that he was without funds. Since he was unable to raise the bail fixed by the trial judge, he had been in custody since sentence and therefore had no opportunity to prepare a bill of exceptions. The court doubted "whether any [bill] can ever be made up on which the appeal can be heard . . . In the particular circumstances of the case at bar, it seems to us that the writ is 'necessary to the complete exercise' of our appellate jurisdictions because . . . there is a danger that it cannot be otherwise exercised at all and a certainty that it must in any event be a good deal hampered".

The court below recognized, however, that a bill of exceptions might be prepared which would be confined to the single point

raised by the writ of *habeas corpus*. This is the basis for the contention that the writ of *habeas corpus* in this case performs the function of an appeal. But inasmuch as McCann was urging a number of grounds for the reversal of his conviction, including the sufficiency of the evidence, the Circuit Court of Appeals was justified in concluding that it would not be fair to make him stake his whole appeal on the single point raised by this writ. We cannot say that the court was unreasonable in the view it took of the situation with which it was presented and with which it was more familiar than the printed record alone can reveal. The writ of *habeas corpus* was not a substitute for the pending appeal, and was therefore not improvidently entertained by the court below.

This brings us to the merits. They are controlled in principle by *Patton* v. *United States*, 281 U. S. 276, and *Johnson* v. *Zerbst*, 304 U. S. 458. The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel. There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer. In taking a contrary view, the court below appears to have been largely influenced by the radiations of this Court's opinion in *Glasser* v. *United States*, 315 U. S. 60. But *Patton* v. *United States*, *supra*, and *Johnson* v. *Zerbst*, *supra*, were left wholly unimpaired by the ruling in the *Glasser* case.

Certain safeguards are essential to criminal justice. The court must be uncoerced, *Moore* v. *Dempsey*, 261 U. S. 86, and it must have no interest other than the pursuit of justice, *Tumey* v. *Ohio*, 273 U. S. 510. The accused must have ample opportunity to meet the case of the prosecution. To that end, the Sixth Amendment of the Constitution abolished the rigors of the common law by affording one charged with crime the assistance of counsel for his defense, *Johnson* v. *Zerbst*, 304 U. S. 458. Such assistance "in the particular situation" of "ignorant defendants in a capital case" led to recognition that "the benefit of counsel was essential to the substance of a hearing", as guaranteed by the Due Process Clause of the Fourteenth Amendment, in criminal prosecutions in the state courts. *Palko* v. *Connecticut*, 302 U. S. 319, 327. Compare *Powell* v. *Alabama*, 287

U. S. 45, and *Betts* v. *Brady*, 316 U. S. 455. The relation of trial by jury to civil rights—especially in criminal cases—is fully revealed by the history which gave rise to the provisions of the Constitution which guarantee that right. Article III, Section 2, paragraph 3; Sixth Amendment; Seventh Amendment. That history is succinctly summarized in the Declaration of Independence in which complaint was made that the Colonies were deprived "in many cases, of the benefits of Trial by Jury". But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of "life, liberty or property".

It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes. Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission. A plea of guilt expresses the defendant's belief that his acts were proscribed by law and that he cannot successfully be defended. It is true, of course, that guilt under Section 215 of the Criminal Code, which makes it a crime to use the mails to defraud, depends upon answers to questions of law raised by application of the statute to particular facts. It is equally true that prosecutions under other provisions of the Criminal Code may raise even more difficult and complex questions of law. But such questions are no less absent when a man pleads guilty than when he resists an accusation of crime. And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice. The task of judging the competence of a particular accused cannot be escaped by announcing delusively simple rules of trial procedure which judges must mechanically follow. The question in each case is whether the accused was competent to exercise an intelligent, informed judgment—and for determination of this question it is of course relevant whether he had the advice of counsel.

But it is quite another matter to suggest that the Constitution unqualifiedly deems all accused incompetent unless he does have the advice of counsel. If a layman is to be precluded from defending himself because the Constitution is said to make him helpless without a lawyer's assistance on questions of law which abstractly underlie all federal criminal prosecutions, it ought not to matter whether the decision he is called upon to make is that of pleading guilty or of waiving a particular mode of trial. Every conviction, including the considerable number based upon pleas of guilty, presupposes at least a tacit disposition of the legal questions involved.

We have already held that one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court. *Patton* v. *United States*, 281 U. S. 276.[3] And whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case. The less rigorous enforcement of the rules of evidence, the greater informality in trial procedure—these are not the only advantages that the absence of a jury may afford to a layman who prefers to make his own defense. In a variety of subtle ways trial by jury may be restrictive of a layman's opportunities to present his case as freely as he wishes. And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury.

But we are asked here to hold that an accused person cannot waive trial by jury, no matter how freely and understandingly he surrenders that right, unless he acts on a lawyer's advice. In other words, although a shrewd and experienced layman may, for his own sufficient reasons, conduct his own defense if he prefers to do so, nevertheless if he does do so the Constitution requires that he

[3] The ruling of the *Patton* case, namely, that the provisions of the Constitution dealing with trial by jury in the federal courts were "meant to confer a right upon the accused which he may forego at his election", 281 U. S. at 298, was expressly recognized and acted upon by Congress in the Act of March 8, 1934, c. 49, 48 Stat. 399, which empowered the Supreme Court to prescribe rules of practice and procedure with respect to "proceedings after verdict, *or finding of guilt by the court if a jury has been waived*, or plea of guilty, in criminal cases in district courts of the United States. . . ." (Italics added.) Compare H. Rep. No. 858, Sen. Rep. No. 257, 73d Cong., 2d Sess.

must defend himself before a jury and not before a judge. But we find nothing in the Constitution, or in the great historic events which gave rise to it, or the history to which it has given rise, to justify such interpolation into the Constitution and such restriction upon the rational administration of criminal justice.

The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. *Johnson* v. *Zerbst*, 304 U. S. 458, 468-69.

Referring to jury trials, Mr. Justice Cardozo, speaking for the Court, had occasion to say, "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." *Palko* v. *Connecticut*, 302 U. S. at 325. Putting this thought in more generalized form, the procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters. To assert as an absolute that a layman, no matter how wise or experienced he may be, is incompetent to choose between judge and jury as the tribunal for determining his guilt or innocence, simply because a lawyer has not advised him on the choice, is to dogmatize beyond the bounds of learning or experience. Were we so to hold, we would impliedly condemn the administration of criminal justice in states deemed otherwise enlightened merely because in their courts the vast majority of criminal cases are tried before a judge without a jury. To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.

Underlying such dogmatism is distrust of the ability of courts to accommodate judgment to the varying circumstances of indi-

vidual cases. But this is to express want of faith in the very tribunals which are charged with enforcement of the Constitution. "Universal distrust", Mr. Justice Holmes admonished us, "creates universal incompetence." *Graham* v. *United States*, 231 U. S. 474, 480. When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards (when such surrenders are as jealously guarded as they are by our rulings in *Patton* v. *United States, supra*, and *Johnson* v. *Zerbst, supra*), and to base such denial on an arbitrary rule that a man cannot choose to conduct his defense before a judge rather than a jury unless, against his will, he has a lawyer to advise him, although he reasonably deems himself the best advisor for his own needs, is to imprison a man in his privileges and call it the Constitution. For it is neither obnoxious to humane standards for the administration of justice as these have been written into the Constitution, nor violative of the rights of any person accused of crime who is capable of weighing his own best interest, to permit him to conduct his own defense in a trial before a judge without a jury, subject as such trial is to public scrutiny and amenable as it is to the corrective oversight of an appellate tribunal and ultimately of the Supreme Court of the Nation.

Once we reject such a doctrinaire view of criminal justice and of the Constitution, there is an end to this case. The *Patton* decision left no room for doubt that a determination of guilt by a court after waiver of jury trial could not be set aside and a new trial ordered except upon a plain showing that such waiver was not freely and intelligently made. If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality. Simply because a result that was insistently invited, namely, a verdict by a court without a jury, disappointed the hopes of the accused, ought not to be sufficient for rejecting it. And if the record before us does not show an intelligent and competent waiver of the right to the assistance of counsel by a defendant who demanded again and again that the judge try

him, and who in his persistence of such a choice knew what he was about, it would be difficult to conceive of a set of circumstances in which there was such a free choice by a self-determining individual.

The order of the court below must therefore be set aside.

So ordered.

Mr. Justice DOUGLAS, dissenting.

The *Patton* case (281 U. S. 276) held that a defendant represented by counsel might waive under certain circumstances trial by a jury of twelve and submit to trial by a jury of only eleven. In view of the strictness of the constitutional mandates I am by no means convinced that it follows that an entire jury may be waived. But assuming *arguendo* that it may be, I think the respondent should have had the benefit of legal advice before his waiver of a jury trial was accepted by the District Court. For I do not believe that we can safely assume that in absence of legal advice a waiver by a layman of his constitutional right to a jury trial was intelligent and competent in such a case as this.

Respondent was indicted under the mail fraud statute, 35 Stat. 1130, 18 U. S. C. § 338. It subjects to fine or imprisonment one who "having devised or intending to devise any scheme or artifice to defraud . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement . . . in any post-office . . . or other letter box of the United States". It would be unlikely that a layman without the benefit of legal advice would understand the limited nature of the defenses available under that statute or the scope of the ultimate issues on which the question of guilt usually turns. Without that understanding I do not see how an intelligent choice between trial by judge or trial by jury could be made.

The broad sweep of the statute has not been restricted by judicial construction. What might appear to a layman as a complete defense has commonly been denied by the courts in keeping with the policy of Congress to draw tight the net around those who tax ingenuity in devising fraudulent schemes. Thus an indict-

ment will be upheld or a conviction sustained though the defendant did not intend to use the mails at the time the scheme was designed,[1] though no one was defrauded or suffered any loss,[2] though the defendant did not intend to receive[3] or did not receive[4] any benefit from the scheme, though the defendant actually believed that his plan would in the end benefit the persons solicited,[5] though the means were ineffective for carrying out the scheme,[6] and perhaps, even though the mails were used not for solicitation but only in collection of checks received pursuant to the plan.[7] In other words, the defenses in law are few and far between. As a practical matter, if the mails were employed at any stage, the question of guilt turns on whether the defendant had a fraudulent intent. That is the significant fact. *Durland* v. *United States*, 161 U. S. 306, 313.

I think a layman normally would need legal advice to know that much. And it seems to me unlikely that he would be capable of appraising his chances as between judge and jury without such advice. Without it he might well conclude that he had adequate defenses on which a judge could better pass than a jury. With such advice he might well pause to entrust the question of his intent to a particular judge, rather than to a jury of his peers drawn from the community where most of the transactions took place and instructed to acquit if they had a reasonable doubt. On the other hand if he had a full understanding of the issues, he might conceivably deem it a matter of large importance that he be tried by the judge rather than a jury. The point is that we should not leave to sheer speculation the question whether his waiver of a jury trial was intelligent and competent. Yet on this record we can only speculate, since all we know is that respondent professed to have "studied law" and that he lost a civil suit which he had prosecuted *pro se*. *McCann* v. *New York Stock Exchange*,

[1] United States v. Young, 232 U. S. 155.

[2] Cowl v. United States, 35 F. 2d 794; United States v. Rowe, 56 F. 2d 747.

[3] Kellogg v. United States, 126 Fed. 323.

[4] Calnay v. United States, 1 F. 2d 926; Chew v. United States, 9 F. 2d 348.

[5] Pandolfo v. United States, 286 Fed. 8; Foshay v. United States, 68 F. 2d 205.

[6] See Durland v. United States, 161 U. S. 306, 315.

[7] Tincher v. United States, 11 F 2d 18; Bradford v. United States, 129 F. 2d 274.

But see Dyhre v. Hudspeth, 106 F. 2d 286; Stapp v. United States, 120 F. 2d 898.

107 F. 2d 908. Furthermore, the right to trial by jury, like the right to have the assistance of counsel, is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, 315 U. S. 60, 76. Moreover, as Judge Learned Hand stated in the court below, the answer to the question whether the waiver was intelligent should hardly be made to depend on "the outcome of a preliminary inquiry as to the competency" of the particular layman. If this constitutional right is to be jealously protected, there should be a reliable objective standard by which the trial court satisfies itself that the layman who waives trial by jury in a case like this has a full understanding of the consequences. *Dillingham* v. *United States*, 76 F. 2d 36, 39. At least where the trial judge fails to inform him the only safe and practical alternative in a case like the present one is to require the appointment of counsel. Only then should we say that the trial judge has exercised that "sound and advised discretion" which the *Patton* case required even before a waiver of one juror was accepted. 281 U. S. p. 312.

The question for us is not whether a judge should be trusted as much as a jury to determine the question of guilt. We are dealing here with one of the great historic civil liberties—the right to trial by jury. Article III, Sec. 2 and the Sixth Amendment which grant that right contain no exception, though a few have been implied. See *Ex parte Quirin*, 317 U. S. —. We should not permit the exceptions to be enlarged by waiver unless it is plain and beyond doubt that the waiver was freely and intelligently made. The *Patton* case surrounds such a waiver with numerous safeguards even where, as in that case, the waiver was made by one who was represented by counsel. We should be even more strict and exacting in case the waiver is made by a layman acting on his own. Then the reasons for indulging every reasonable presumption against a waiver of "fundamental constitutional rights" (*Johnson* v. *Zerbst*, 304 U. S. 458, 464) become even more compelling.

The fact that a defendant ordinarily may dispense with a trial by admitting his guilt is no reason for accepting this layman's waiver of a jury trial. What the Constitution requires is that the "trial" of a crime "shall be by jury". Art. III, Sec. 2. And it specifies the machinery which shall be employed if a plea of not guilty is entered and the prosecution is put to its proof. More-

over, we are not dealing here with absolutes. Normally admission of guilt could properly be accepted without more since ordinarily a defendant would know whether or not he was guilty of the crime charged. But there might conceivably be an exception, where, for example, the issue of guilt turned not only on the admitted facts but upon the construction of a statute. Each case of necessity turns on its own facts. Nor is it a sufficient answer to say that if legal advice is required for a waiver of trial by jury, then by the same token a layman representing himself could not exercise his own judgment concerning any matter during the trial with respect to which a lawyer might have superior knowledge. Whether the waiver of counsel for purposes of the trial meets the exacting standards of *Johnson* v. *Zerbst* is one thing. Whether that dilution of constitutional rights may be compounded by a waiver of trial by jury is quite another. It is the cumulative effect of the several waivers of constitutional rights in a given case which must be gauged. Nor can I accede to the suggestion of the prosecution that a layman's right to waive trial by jury is such an important part of his high privilege to manage his own case that its exercise should be freely accorded. That argument is faintly reminiscent of those notions of freedom of choice and liberty of contract which long denied protection to the individual in other fields.

Mr. Justice BLACK and Mr. Justice MURPHY join in this dissent.

Mr. Justice MURPHY.

I join my brother DOUGLAS, but desire to add the following views in dissent.

The Constitution provides: "The Trial of all Crimes, . . . shall be by Jury; . . ." (Article III, § 2), and: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ." (Amendment VI). Because of these provisions, the fundamental nature of jury trial,[1] and its beneficial effects as a means of leavening justice with the

[1] Compare Glasser v. United States, 315 U. S. 60, 84-85, and Jacob v. New York, 315 U. S. 752.

spirit of the times.[2] I do not concede that the right to a jury trial can be waived in criminal proceedings in the federal courts. Whatever may be the logic of the matter, there is a considerable practical difference between trial by eleven jurors, the situation in *Patton* v. *United States*, 281 U. S. 276, and trial to the court, and practicality is a sturdy guide to the preservation of Constitutional guaranties.

But if it is assumed that jury trial, the prized product of the travail of the past, can be waived by an accused, there should be compliance with rigorous standards, adequately designed to insure that an accused fully understands his rights and intelligently appreciates the effects of his step, before a court should accept such a waiver. Among those requirements in the case of a layman defendant in a criminal proceeding where the punishment may be substantial, as in the instant case, should be the right to have the benefit of the advice of counsel on the desirability of waiver. Of course the capacity of individuals to appraise their interests varies, but such a uniform general rule will protect the rights of all much better than a rule depending upon the fluctuating factual variables of the individual case which are often difficult to evaluate on the basis of the cold record. In my opinion the Constitution requires this general rule as an absolute right if a jury is to be waived at all.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[2] This is admirably stated by Judge Learned Hand below, 126 F. 2d at 775-776.